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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner-Appellant

v.

HERCULES INCORPORATED,
Respondent-Appellee

and

GOULD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Patrick W. Kittredge, Esquire
Joseph M. Donley, Esquire

KITTREDGE, KAUFMAN & DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107
(215) 732-2700

Counsel of Record for Petitioner

Robert Emmet Hernan, Esquire
Co-Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED FOR REVIEW

1. Does physical damage to Petitioner's property constitute an injury in fact and, therefore, satisfy the federal constitutional requirement of standing for Petitioner to sue the party responsible for the damage?

2. Does physical damage to Petitioner's property resulting from pollution constitute a particularized harm of a kind different from that suffered by members of the public and, thus, give Petitioner a claim for relief under public nuisance?

3. Does a present owner of land have the right to sue, for indemnification, a former owner of the same land who polluted the land, the groundwater beneath and the Delaware River adjacent to the land, when the present owner was required by law to abate the pollution?

PARTIES TO THE PROCEEDING BELOW

The petition to this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit is sought by Philadelphia Electric Company, the plaintiff before the District Court for the Eastern District of Pennsylvania and the appellee before the United States Court of Appeals for the Third Circuit. Respondent Hercules Incorporated was a defendant before the District Court, and appellant before the Third Circuit Court. Gould, Inc. was a defendant before the District Court.

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, denying Respondent's Post-Trial Motions, is reported at 587 F. Supp. 144 (E.D.Pa. 1984) and is set forth in the Appendix, at 33, for this Court's convenience.

The opinion of the Court of Appeals for the Third Circuit is reported at 762 F.2d 303 (3d Cir. 1985) and is

set forth in the Appendix, at 1, for this Court's convenience.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 28, 1985. Petitioner Philadelphia Electric Company timely filed a petition for rehearing, which petition was denied on June 21, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves, in part, an interpretation of Article III, Section 2 of the United States Constitution which provides, in relevant part, that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

This lawsuit resulted from the pollution of a certain parcel of property located in Chester, Pennsylvania. In the years from 1945 to 1971 Pennsylvania Industrial Chemical Corporation ("PICCO") operated a synthetic hydrocarbon resin manufacturing and processing plant on the property in Chester, Pennsylvania ("Chester site"). The property lay adjacent to the Delaware River and at the time PICCO acquired the Chester site an inlet was located at the south end of the Chester site which opened into the Delaware River. Sometime after acquiring the Chester site, but during the period of time when PICCO conducted its resin manufacturing operation at the Chester site, PICCO filled in the shoreline at or about the inlet, thereby creating a lagoon or lake ("PICCO Lake"); PICCO also filled in other low lying areas on the property. During the course of its ownership and control of the Chester site, PICCO buried, deposited or placed resins, resin-laden materials and/or other by-products and chemicals used in its operation in the PICCO Lake and in various locations about the Chester property.

In 1971 PICCO ceased its operations at the Chester site and sold the property to Gould, Inc. ("Gould"). Gould did not conduct any operations at the Chester facility, other than leasing certain tanks to ABM Disposal Services Company ("ABM"). ABM did not store or dispose of resins or resinous by-products at the Chester site. In 1974 Gould sold the Chester site to Petitioner Philadelphia Electric Company ("PECO"). PECO has owned the property since 1974, and while PECO has leased sections of the property to third parties,[1] it has not undertaken any operations on the site.

In 1972, Hercules Incorporated ("Hercules") acquired PICCO, including PICCO's operations in Western Pennsylvania and Louisiana. As part of the

1. None of these third parties conducted resin manufacturing or storage operations.

acquisition of PICCO, Hercules expressly assumed "all of the debts, obligations and liabilities of PICCO," with certain exceptions not applicable to the instant claim.

Then, in 1980, the Pennsylvania Department of Environmental Resources ("DER") discovered that resinous materials were leaching from the banks of the Delaware River at the Chester site, and that the PICCO Lake was contaminated with resinous materials. On August 22, 1980, DER issued a citation against PECO, as owner of the property, for violation of the Pennsylvania Clean Streams Law, 35 Pa.C.S.A. §691.01 (Purdon 1977). The citation required PECO to abate the polluting condition at the Chester site, including the pumping of the PICCO Lake and the removal of soil contaminated by the resinous materials. After further investigation by PECO and DER, PECO removed the resinous materials from the site at a cost in excess of $340,000.00.

Thereafter, PECO instituted a Complaint against Hercules[2] alleging that the contamination caused by PICCO, in dumping its resinous materials, had polluted PECO's property, including the soils at the property; that the contamination continued to pollute the groundwater underneath the Chester site and had leached onto the banks of and into the Delaware River; and that PECO had been required by DER to abate the pollution. Jurisdiction was founded on diversity of citizenship.

Prior to trial and pursuant to Cross-Motions for Summary Judgment on the issue of Hercules' liability for PICCO's actions, the District Court held that Hercules had expressly assumed PICCO's liabilities and that Hercules' acquisition of PICCO constituted a *de facto* merger, which also imposed liability upon Hercules for PICCO's conduct.

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2. PECO also sued Gould, Inc., from whom it purchased the property, on the ground that Gould had failed to disclose the latent contamination. Prior to trial, and as a result of the discovery process, PECO determined its case against Gould was quite weak and settled with Gould for a nominal sum.

A jury trial commenced on June 29, 1983 and encompassed three days. During the course of that trial, PECO submitted expert evidence which virtually "fingerprinted" the pollutants found on the site as PICCO products. At the conclusion of the trial, the jury found, by Special Interrogatories, that PICCO caused the contamination of the Chester site and that the contamination was continuing to pollute the groundwater or the Delaware River (Appendix, at 57). Based on the jury's answers to the Special Interrogatories, the Court then entered a judgment against Hercules for the clean-up costs of $345,906.69, together with delay damages as provided by Pennsylvania Rule of Civil Procedure 238, and the Court required Hercules to abate the continuing contamination found by the jury to be present on and about the Chester site.

Hercules filed a Motion for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial, on various grounds, including that the District Court had erred in holding Hercules liable for the conduct of PICCO, and that PECO had failed to state a claim for relief for private or public nuisance. The District Court denied Hercules' Post-Trial Motions and Hercules appealed to the Third Circuit Court of Appeals (Appendix, at 33).

On May 28, 1985, the Third Circuit Court of Appeals affirmed the District Court's determination that Hercules had expressly assumed the liabilities of PICCO and, additionally, that the acquisition of PICCO by Hercules constituted a *de facto* merger, thereby imposing liability on Hercules for the contamination caused by its predecessor in interest, PICCO. However, the Third Circuit Court of Appeals also held that PECO failed to state or prove a claim for relief for private nuisance, that PECO had no standing to sue for relief under public nuisance, and that PECO was not entitled to relief for indemnification (Appendix, at 16-31).

PECO timely filed a Petition for Rehearing in Banc with the Third Circuit on the grounds that PECO did have standing to maintain an action for public nuisance and that PECO was entitled to indemnification from Hercules. On June 21, 1985, the Third Circuit Court of Appeals denied PECO's Petition for Rehearing (Appendix, at 55).

REASONS FOR GRANTING CERTIORARI

I. The Third Circuit Court Of Appeals Erred In Holding That Petitioner Lacked Standing To Maintain An Action For Public Nuisance

The Third Circuit Court of Appeals' decision in this case contravenes the well-established rulings of the Supreme Court on the fundamental, federal constitutional issue of *standing*. Regardless of what uncertainties exist at the boundaries of the issue of standing, this Court has never waivered from the central position that a plaintiff which alleges an "actual injury" satisfies the constitutional mandate that a federal court exercise its power only over a "case" or "controversy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Yet, the Third Circuit has held otherwise.

The Third Circuit found, in the instant case, that the owner of a property polluted by chemicals has *no standing* to sue, for damages and injunctive relief, the former owner of the property which caused the pollution, despite the uncontroverted facts that the property itself, the groundwater and an adjacent river were damaged by the pollution, the present owner spent over $340,000 to abate the pollution, and the pollution was continuing to cause damage. This unprecedented ruling by the Third Circuit turns the standing requirement on its head and is violative of Petitioner's federal constitutional right to

prosecute its claim in the federal courts. Moreover, the Third Circuit's ruling that Petitioner PECO had no standing to sue for a public nuisance neither estops, nor bars, Petitioner from relitigating its claims against Hercules, since such a ruling does not constitute a decision on the merits of Petitioner's claims. This Supreme Court, in its supervisory role, cannot permit such uncertainty to prevail in the Circuit Courts.

The question as to standing is required by the United States Constitution, Article III, Section 2, limitation which restricts federal court jurisdiction only to "cases" or "controversies." Whether a plaintiff will be accorded standing to litigate its claim in a federal court depends upon whether the plaintiff has " 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), *citing Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed. 663 (1962).

Moreover, since standing is an element of the federal constitutional concept of "case" and "controversy," "the federal courts must reach their own decisions without regard to what the state law in point may be." WRIGHT, THE LAW OF FEDERAL COURTS, §13 at 60 (4th ed. 1983). As Justice Powell noted in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977): "[s]tate law of standing, however, does not govern such determinations in the federal courts. The constitutional and prudential considerations canvassed at length in *Warth v. Seldin* . . . respond to concerns that are peculiarly federal in nature." 429 U.S. at 262, n. 8 (citation omitted).

While this Supreme Court has applied "prudential" limits on who may invoke federal jurisdiction, in addition to the Article III constitutional mandate of a "personal stake in the outcome of the controversy," such limits have been applied only in two particular and narrowly

defined circumstances, neither of which is applicable to the instant case. First, a plaintiff may be precluded from litigating a claim in federal court if the asserted harm is in the nature of a generalized grievance shared in substantially equal measure by all or a large class of citizens because of the necessarily abstract nature of the injury all citizens share.[3] Thus, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), a Committee of Reservists and five individuals were held not to have standing to claim that armed forces reserve memberships of members of Congress violated the incompatibility clause of the Constitution because, as citizens, their claim involved only the generalized interest of all citizens and, thus, their claim constituted a mere abstract injury rather than a concrete injury. In addition, as taxpayers, their claims failed to satisfy the demands of *Flast v. Cohen*, 392 U.S. 83 (1968). *See also United States v. Richardson*, 418 U.S. 166 (1974). Second, a plaintiff may be precluded from federal court litigation if such plaintiff attempts to assert the legal rights or interests of third parties. *See, e.g., Tileston v. Ullman*, 318 U.S. 44 (1943).

As indicated by this Court in *Warth v. Seldin, supra*, these "prudential" limitations, above and beyond the constitutional requirement, have been judicially imposed out of concern that:

> [w]ithout such limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide

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3. While it will be seen later that the language of this analysis is superficially similar to the analysis of the merits of Petitioner's claim under public nuisance, and that this superficial similarity may have led the Third Circuit astray, the requirements of standing are federal in nature while the requirements of a claim for public nuisance are state-law determinative. And in the difference therein hangs the Third Circuit's self-created confusion.

> public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

422 U.S. at 500. Such concerns derive from the federal judiciary's reluctance to intrude into areas of public interests more properly the province of the legislative or executive branches of government. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

In the instant case, which involves a dispute between private parties over a concrete injury to private property, such concerns are irrelevant. Thus, the "prudential" limitations imposed on the issue of standing are not implicated by the facts of the instant case, and so this Supreme Court need only consider whether Petitioner has satisfied the constitutional requirement of standing.

Standing, in the constitutional sense, is "an aspect of justiciability . . . surrounded by the same complexities and vagaries that inhere in justiciability." *Flast v. Cohen*, 392 U.S. at 98. And since the issue of justiciability goes to the heart of a federal court's existence, i.e. its power to hear cases, the constitutional dimension of the issue, and its articulation, has ebbed and flowed to some extent with the historical tides of a federal court's power vis-a-vis the legislative and executive branches of government. Thus, in the period prior to the 1960s a restrictive view of standing prevailed and a "direct injury" or "legal right" standard applied. *See, e.g., Tennessee Electric Power Company v. TVA*, 306 U.S. 118 (1930); *Frothingham v. Mellon*, 262 U.S. 447 (1923). During the 1960s, a line of cases expanded the notion of standing and, therefore, access to federal courts, so long as a plaintiff could show "injury in fact", or a personal stake in the outcome of the controversy in order to assure a concrete adverseness. *See, e.g., Flast v. Cohen, supra; Baker v.*

Carr, 369 U.S. 186 (1962). As the doctrine of standing evolved, private parties were also granted standing to contest federal administrative actions so long as they suffered an "injury in fact" as a result of the challenged action and their interest was within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp, supra; Barlow v. Collins*, 397 U.S. 159 (1970). But also, in the 1970s, and continuing into the present decade, a contraction of standing has occurred. *See, e.g., United States v. Richardson, supra; Schlesinger v. Reservists Committee to Stop the War, supra.* These cases, "building heavily on a renewed emphasis on separation of powers principles, make it clear that a direct injury, and not merely a general interest common to all members of the public, is required for standing." WRIGHT, LAW OF FEDERAL COURTS, §13, at 67 (4th ed. 1983).

In spite of the complexities and vagaries which may exist at the borders of the doctrine of standing, the central theme of the doctrine of standing has remained fixed: A plaintiff which has suffered an injury in fact, is accorded standing by the federal constitution to seek redress in a federal court. Or, in perhaps the clearest and most succinct articulation of the constitutional standard, "[t]he plaintiff must show that he himself is injured by the challenged action of the defendant." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

When private plaintiffs assert a right to contest a federal statute or federal administrative agency action, such plaintiffs must demonstrate their interest in, and the effect on them of such statute or action in order to satisfy the standing requirement. But, when the claims before the federal court are asserted by one private party against another private party for damages to private property resulting from, and for injunctive relief against, the

defendant's conduct, the issue of standing is rarely addressed because standing to bring the lawsuit is uncontrovertible:

> [t]he law of standing is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action. In theory, of course, it is not so limited. The person suing for breach of contract or for a tort must satisfy the court that he has standing to bring such a suit, but in practice such suits are brought only by a person harmed by the supposed wrong and his standing to sue is self-evident.

WRIGHT, LAW OF FEDERAL COURTS, §13, at 60 (4th ed. 1983). Yet, the holding by the Third Circuit Court of Appeals in the instant case certainly distorts and confuses what otherwise was a clear corollary of the doctrine of standing in the federal courts.

The Third Circuit has held in effect in this case that even if a private party plaintiff alleges, and proves, that it has suffered monetary damages, in excess of $340,000, as a result of the private defendant's conduct, nevertheless such a plaintiff has no constitutional right to stand in federal court to seek redress of its complaints. On its face, such a holding destroys the axis around which the doctrine of standing turns. It is a holding which violates Petitioner's rights under the federal constitution, and it flies in the face of every decision on standing enunciated by the Supreme Court.

Even looking beyond the face of the decision, the holding cannot withstand constitutional scrutiny as a simple recital of the pertinent facts of the case reveals. Petitioner owned land in Chester, Pennsylvania which land bordered the Delaware River. In 1980 it was discovered that the land (private property), the groundwater beneath the land and the Delaware River adjacent to

the land (public property) had been contaminated as a result of the industrial practices of a former owner of the land. Petitioner attempted to abate the pollution, at a cost in excess of $340,000, and pursuant to the express requirements of Pennsylvania law and at the direction of the Pennsylvania Department of Environmental Resources. Petitioner then brought the instant lawsuit against Respondent, the party responsible for the pollution, claiming that Respondent's conduct constituted a private and/or public nuisance.

A jury found that Respondent was responsible for the pollution of Petitioner's property and that, indeed, the pollution was continuing to contaminate the groundwater beneath the property or the Delaware River adjacent to the property. *See* Jury Answers to Special Interrogatories, Appendix, at 57. The District Court entered judgment on the jury's verdict and ordered Respondent to abate the continuing pollution. Respondent then filed Post-Trial Motions with the District Court on the grounds, in part, that Respondent had not assumed the liabilities of PICCO, and that Petitioner had failed to state a claim for relief for private or public nuisance. The District Court denied Respondent's Post-Trial Motions (Appendix, at 33).

On appeal the Third Circuit affirmed the District Court's ruling that Respondent was responsible, as a successor corporation, for the acts of PICCO, the polluter (Appendix, at 8-16). The Third Circuit also held that Petitioner had failed to plead, or prove, a cause of action in private nuisance (Appendix, at 16-22).

The Third Circuit then turned its consideration to Petitioner's public nuisance theory of recovery and posited: "[t]he question before us is whether PECO has *standing* to bring an individual action for damages or injunctive relief for interference with a public right." (Appendix, at 24, emphasis added).

The Court's answer to the question can be formulated, in summary fashion, as follows:

> [t]o recover for public nuisance a party must have been exercising a right common to the public, which right was interfered with by Respondent's conduct.
>
> Petitioner was not actually using the Delaware River, the use of which waters constituted the public right.
>
> Therefore, Petitioner had *no standing* to sue Respondent.

Nowhere in this implied syllogism nor in the exposition of the Third Circuit's holding is there any consideration of whether Petitioner suffered an injury in fact, or satisfied any other standard for determining whether Petitioner fulfilled the constitutional requirement of standing. Nevertheless, at the beginning of its discussion in regard to the public nuisance issue, the Circuit Court contended that the issue depends on whether Petitioner had standing, and at the end of its discussion the Court held that Petitioner "lacks standing" (Appendix, at 25).

Petitioner respectfully submits that the Third Circuit could not have meant what it said in regard to Petitioner's *standing* to bring a claim for public nuisance. Rather than addressing the issue of standing, as the Circuit Court claimed, it seems that the Third Circuit was attempting to address the merits of Petitioner's claim for public nuisance. It can be postulated only that the Circuit Court intended to hold that Petitioner had failed to allege or prove one element of a cause of action in public nuisance. This is the only sensible interpretation of the Circuit Court's analysis and opinion. The Circuit Court reasoned that to recover under a public nuisance claim, Petitioner must have suffered harm of a kind different from that suffered by other members of the public "exercising the right common to the general public that was the subject of interference." The Court then found

that the public right at issue was the right to "pure water," and Petitioner did not allege that "it used the waters of the Delaware River itself, or that it was directly harmed in any way by the pollution of those waters" (Appendix, at 24-25).[4] Rather, the Circuit Court found, in a display of convoluted logic, that the contamination of Petitioner's property was the cause of the pollution of the Delaware River, not the result of the pollution, and Petitioner was "harmed only in the exercise of its private property rights over the Chester site" (Appendix, at 25). Therefore, the Court held that Petitioner "lacks *standing* to sue for public nuisance" (Appendix, at 25; emphasis added).

Thus, the Circuit Court took Petitioner's claim for public nuisance and erroneously held that Petitioner lacked standing to sue, when it presumably intended to dispose of Petitioner's claim on the merits, i.e. failure to state a claim for public nuisance. Such error by the Third Circuit is neither a mere slip of the pen, nor harmless. Such error is reversible.

There can be no question that Petitioner has alleged and proven that it suffered an actual, concrete injury in fact sufficient to satisfy the federal constitutional requirement of standing. Therefore, the Third Circuit's decision must be reversed as it violates Petitioner's federal constitutional rights. If the error is not reversed, it not only violates individual Petitioner's rights, it also threatens to wreak havoc on the federal court system.

For if the Third Circuit, or any other Circuit Court, is permitted to deny plaintiff an entitlement to relief, after a full trial on the merits, on the ground of lack of standing, when the Court presumably meant to dispose of the case on the merits, then the Circuit Court thereby

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4. The Third Circuit completely ignored the allegation and uncontradicted proof that the pollution caused by Respondent harmed Petitioner's property, namely the soils at the property, and contaminated the public groundwater beneath Petitioner's property. See District Court Opinion, Appendix, at 33.

destroys the finality to the case and reopens the case for further litigation. For denial of relief on the ground of standing does not reach the merits of the case, and therefore, does not serve to bar a relitigation of the same dispute.

"For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678 (1946); *see also Baker v. Carr, supra*. It is equally well settled that dismissal of an action for lack of standing does *not* call for a judgment on the merits and therefore does not act as a bar to a later suit, on the very same facts. WRIGHT, LAW OF FEDERAL COURTS, §13, at 67-68 (4th ed. 1983).

For instance, in *McCarney v. Ford Motor Company*, 657 F.2d 230 (8th Cir. 1981), a former automobile dealer sued an automobile manufacturer claiming that the manufacturer had forced the former dealer to sell his dealership at a low price by harassing and unfairly treating the former dealer. In an earlier case, the former dealer claimed that defendant manufacturer, through a campaign of harassment and unfair dealing, compelled the dealer to sell his dealership, which sale allegedly was at an unfavorable price. In that earlier case the former dealer filed suit in federal court claiming violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §1221 *et seq.*, and the District Court had granted Defendant's motion for summary judgment on the ground that the former dealer, as an individual, lacked standing under the federal statute.

The former dealer did not appeal the first case, but instead filed a second action claiming entitlement to relief, upon the same facts, under the Sherman Act; a state statute prohibiting termination of a supply contract without good cause; wrongful termination; breach of fiduciary duty; and wrongful interference with a contract.

In the second action, the defendant manufacturer was granted summary judgment by the District Court,

on the grounds of res judicata and collateral estoppel because of the dismissal of the earlier case brought by the same plaintiff against the same defendant. On review, the Eighth Circuit Court defined the issue as follows: "[t]he case presents the difficult but narrow issue of whether a dismissal for lack of standing to invoke a particular statute can act as a bar to a later suit based upon the same factual allegations." 657 F.2d at 231. The Circuit Court held that it did not, and reversed and remanded the case.

In so ruling, the Eighth Circuit found that the District Court's holding in the first case was somewhat ambiguous in that the District Court mixed its analysis of lack of standing and failure to state a claim upon which relief could be granted, but nevertheless, the Eighth Circuit Court concluded that in the original District Court decision, "the judgment was based upon lack of standing and not that the plaintiff failed to state a claim upon which relief could be granted." 657 F.2d at 232, n. 4.

The Eighth Circuit went on to reason that, "[t]he Supreme Court has expressly delineated a distinction between the issue of standing and the merits of a particular lawsuit." 657 F.2d at 232-233, relying on *Warth v. Seldin*, 422 U.S. 490 (1975). The Circuit Court then held:

> [w]e hold, therefore, that a dismissal based upon a lack of standing is not 'on the merits' of the underlying substantive claim and is not a bar to asserting another theory of relief based upon the same operative facts assuming the other elements of claim preclusion are satisfied.

657 F.2d at 234.

The Third Circuit in the instant case has committed the very same error as the District Court in the first *McCarney* case: it has confused the issue of standing with that of whether there was a failure to state a claim for

relief. This Supreme Court must not allow such confusion to exist in the Third Circuit, or any other Circuit, because to do so would reopen the courtroom door to lawsuits that otherwise should be barred. Nor is such error harmless as to Petitioner. As more fully discussed in the following section, if the Third Circuit Court of Appeals had analyzed the issue in terms of whether Petitioner had stated a claim for relief for public nuisance instead of confusingly determining that Petitioner lacked standing to sue, then it is submitted the result of the Circuit Court's decision would have been quite different.

Therefore, Petitioner respectfully requests that its Petition for Certiorari be granted and, after full consideration by this Court, that the judgment of the Third Circuit be reversed.

II. Petitioner Has Stated And Proven A Claim For Relief Under Public Nuisance

If the Third Circuit Court had not been confused and had clearly examined and analyzed whether Petitioner had stated and proven a claim for relief under public nuisance, then the Third Circuit undoubtedly would have reached a different result. Under the law of public nuisance a plaintiff must only prove "particular" damages from the alleged wrong, and physical harm to a plaintiff's land has always been held to be such particularized harm. Restatement (Second) of Torts, §821 C. In the instant case, Petitioner PECO most assuredly alleged and proved physical harm to its land as a result of the public nuisance for which Respondent was held liable. Yet the Third Circuit has confused this requirement with the constitutional requirement that a party must have standing to sue in federal court.

Petitioner respectfully posits that the confusion resulting in the Third Circuit's decision is as follows: standing focuses on the party seeking to get his complaint before the federal court, rather than on the issue

the party seeks to have adjudicated. *Schlesinger v. Reservists Committee to Stop the War, supra.* A claim for public nuisance is, of course, the issue to be adjudicated in the instant case.

In analyzing for the presence of standing, the federal court must examine whether the impact on the plaintiff of the action or statute is plainly undifferentiated and common to all members of the public. If it is, then plaintiff has not alleged "some particularized injury that sets him apart from the man in the street." *United States v. Richardson,* 418 U.S. at 2955 (Powell, J., concurring). And plaintiff would have no standing because plaintiff has alleged or proven only an abstract dispute.

In analyzing a public nuisance claim *on its merits,* the plaintiff must plead, and prove, a particular damage, different in kind and degree from that suffered by the general public. Restatement (Second) of Torts §821C. The requirement of demonstrating "particular" damage was intended to limit access in the courts for complaints about public matters, in as much as complaints about public matters were the sole and proper province of duly-constituted public officials. *See* PROSSER, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997 (1966). However, physical injury or property damage have *always* been deemed damages "particular" enough to satisfy a claim for relief under public nuisance. PROSSER AND KEETON ON TORTS, §90, at 648 (5th ed. 1984); PROSSER, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997, 1011-12 (1966). Later, the scope of recovery for public nuisance was broadened to allow recovery so long as the plaintiff's damages were different in kind and degree from those suffered by the general public and such damages were suffered while the injured party was exercising a right common to the general public. Restatement (Second) of Torts, §821C; PROSSER, *supra.*

A paradigm of the boundaries that constitute "particular damage" suffered by one exercising rights common to the public is found in the case of *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D.Me. 1973), *aff'd*, 559 F.2d 1200 (1st Cir. 1977) (see Appendix, at 23, n. 11). In *Burgess*, plaintiffs, in class actions, sought recovery for damages incurred as a result of the discharge of approximately 100,000 gallons of oil from a tanker, the M/V Tamano, into the waters of Casco Bay in Maine. Defendants were the ship, owners, captain, pilot and local pilots' association, as well as the charterer, the State of Maine and the United States. Liability was asserted on theories of negligence, unseaworthiness, trespass and nuisance, as well as under the Rivers and Harbors Act of 1899, 33 U.S.C. §407 and Water Quality Improvement Act of 1970, 33 U.S.C. §1161(b)(2). However, the Court noted that: "[p]laintiffs' principal claims sound in nuisance, and, although they also assert claims based on negligence, unseaworthiness, trespass and statutory violations, it is not suggested that their right to recover damages for pecuniary losses sustained by them as a result of the spill may differ according to the theory upon which they predicate defendants' liability." 370 F. Supp. at 250, n. 2. Thus, the Court analyzed the claims under a public nuisance theory.

Defendants filed motions to dismiss the claims of three of the plaintiff classes: the commercial fishermen; the commercial clam diggers; and the owners of the motels, trailer parks, camp grounds, restaurants, grocery stores and similar businesses which depended on the tourist trade and which were adversely affected by the oil spill. Defendants contended that economic loss, including loss of profits and impairment of earning capacity, were not legally cognizable damages, under a theory of public nuisance, among other theories, because none of the plaintiffs in question had any property interest in the

waters or marine life or shores claimed to have been polluted. The District Court held that, "the motions to dismiss the claims of the commercial fishermen and clam diggers must be denied, but that the motions to dismiss the claims of the . . . businessmen, *other than those who owned shore property physically injured by the spill,* must be granted." 370 F. Supp. at 249 (emphasis added).

The District Court differentiated the commercial fishermen and clam diggers, on one hand, from the businessmen, on the other hand, as follows:

> [t]he commercial fisherman and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the State of Maine. The injury of which they complain has resulted from defendants' alleged interference with *their* direct exercise of the public right to fish and to dig clams.

370 F. Supp. at 250.
On the other hand, the business owners:

> do not assert any interference with *their* direct exercise of a public right. They complain only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches *in which they do not have a property interest.* Although in some instances their damage may be greater in degree, the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents of the . . . [affected] area.

370 F. Supp. at 251 (emphasis added).
The line drawn by the District Court is such that those parties which were directly affected by the pollution can recover but not those parties only indirectly affected. In the former category are those who owned shore property

physically injured by the spill as well as commercial fishermen and clam diggers; in the latter category are those who suffered indirect business losses from the spill.

The Court's emphasis on the fact that the commercial fishermen and clam diggers were actually and directly *exercising* the use of the right to fish and to dig clams was necessary to set them apart from the tourist-trade businessmen because traditionally only one whose property was damaged would recover and the fishermen and clam diggers had no proprietary interest in the public waters.

What remains clear in the District Court's reasoning is that it is uncontested that one whose property was damaged can recover for public nuisance, irrespective of whether the property owner was *exercising* rights common to the public.

In the instant case, Petitioner PECO proved that its property was damaged, to the extent that Petitioner incurred over $340,000 in costs to remove contaminated soil from the property, and that the public groundwater beneath the Delaware River adjacent to Petitioner's property was also polluted by PICCO's operations. Even the Third Circuit Court of Appeals did not contest the fact that a public nuisance was created by PICCO, and that Respondent Hercules was liable for PICCO's actions. (Appendix, at 8-16). Yet, the Third Circuit erroneously reasoned that Petitioner PECO did not have standing because it was not exercising the right to use the public waters of the Delaware River, unlike the commercial fishermen in the *Burgess* case, and, therefore, PECO could not maintain an action for public nuisance. Thus arises the Third Circuit's confusion of federal standing requirements and the elements which must be satisfied in order to recover for public nuisance.

This result is contrary to the uncontested rule of law that if an owner of property suffers damage to that property as a result of a nuisance which *also* affects public rights, then the property owner is entitled to maintain an

action for public nuisance. *See, e.g., Heinl v. Pecher*, 330 Pa. 232, 198 A. 797(1938); *Akau v. Olomana Corporation*, 65 Hawaii 383 (1921); *Frady v. Portland General Electric Co.*, 637 P.2d 1345 (Or.App. 1981); Prosser, *Private Action for Public Nuisance*, 52 Va.L.Rev. 997, 1018 (1966). Only if the claimant has not suffered property damage, or personal injury, is it necessary to determine if the damage which is alleged was of a nature different in kind and degree from that suffered by the general public in the exercise of a public right.

III. The Third Circuit Erred In Holding That Petitioner PECO Is Not Entitled To Indemnification From Hercules

The Third Circuit has also held that PECO is not entitled to indemnification from Hercules because PECO could not have been compelled through legal action taken by DER pursuant to the Clean Streams Law to incur the abatement expenses for the nuisance created by Hercules.

However, §691.316 of the Clean Streams Law specifically provides in pertinent part:

> [w]henever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

Under the Pennsylvania Clean Streams Law, "pollution" is defined as "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance." 35 Pa. C.S.A. §691.1 (Purdon 1977). The jury specifically found that Hercules had created a nuisance which was polluting or contaminating the Delaware River and the groundwater beneath the Chester site. PECO removed the contamination left by PICCO and then sued Hercules to recover the costs of the cleanup, as it is entitled to under principles of indemnification. As articulated by the Court in *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325, 77 A.2d 368, 370 (1951):

> [t]he right of *indemnity* rests upon a difference between the primary and the secondary liability . . . . It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.

The Court continued:

> secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

366 Pa. at 328, 77 A.2d at 371.
See also, Mixter v. Mack Trucks, Inc., 224 Pa. Super. 313, 308 A.2d 139 (1973); Restatement of Restitution, §§95, 96 (1937).

The instant case falls squarely within the protection afforded by the law of indemnification. PECO was required by Pennsylvania law to abate the nuisance only

because of PECO's status as landowner. *See* Clean Streams Law, 35 Pa.C.S.A. §691.316 (Purdon 1977); *National Wood Preservers, Inc. v. Commonwealth Department of Environmental Resources,* 489 Pa. 221, 414 A.2d 37 (1980). PECO's liability was imputed, constructive and statutory, i.e. secondary. Under the law of nuisance, PECO is entitled to recover from the party which is primarily liable for creating the nuisance, PICCO/ Hercules. That is what the jury found and the District Court affirmed.

The Third Circuit attempts to justify not shifting the responsibility to Hercules where it properly lies on the basis that Hercules was not the culprit, rather it was PICCO. But such an "equitable" analysis contradicts the Third Circuit's holding that Hercules *is* PICCO by virtue of the *de facto* merger doctrine and the Panel's holding that: "Hercules has [expressly] assumed any liability PICCO may have had due to the pollution of the Chester site." (Appendix, at 11). Surely PICCO (ergo Hercules) "was best suited to prevent the pollution." There can be no question but that PICCO, if it had not been merged into Hercules, would have had to answer to PECO for indemnification. Nevertheless, the Third Circuit seemed to be swayed by the "fairness" of making PECO bear the responsibility because "PECO had an opportunity to protect itself through inspection and negotiation . . ." (Appendix, at 30). But even if that consideration had *any* bearing on the issues, it ignores the reality of the case and the evidence. PECO asserted, and evidence so established, that the buried contaminants were a latent condition undiscovered until years later. Indeed, Hercules' defense proffered through former PICCO employees was that PICCO had not deposited the pollutants of which PECO and DER complained.

It is difficult to understand why the Third Circuit believed it is fairer to shift the burden for this nuisance to PECO, who certainly had nothing to do with its creation, rather than to the party who created it. Once the

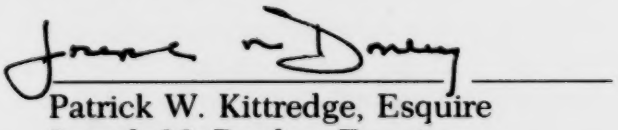
Third Circuit determined that Hercules assumed the liability for the Chester site, it acknowledged that Hercules is primarily liable and it, not PECO, should bear the burden of abatement.

CONCLUSION

The decision of the Third Circuit Court of Appeals in this case presents a grave disruption of the well-established principles of *standing* as defined by the prior decisions of this Court. This unprecedented ruling by the Third Circuit seriously muddles the federal constitutional issue of standing with an analysis of whether Petitioner failed to state a claim upon which relief could be granted. Regardless of the intention of the Third Circuit, its decision violates Petitioner's federal constitutionally protected right in specifically holding that Petitioner had no standing to sue for public nuisance. Moreover, the decision of the Third Circuit wreaks havoc on the federal court system by destroying the finality of the case and reopens the case for further litigation, since a denial of relief on the ground of standing does not reach the merits of the case. Nor was the fundamental error committed by the Third Circuit harmless as to Petitioner. A proper analysis of Petitioner's public nuisance claims would have resulted in the inexorable conclusion that Petitioner was entitled to its judgment against Respondent for monetary and injunctive relief for the pollution of its property.

Accordingly, Petitioner respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



Patrick W. Kittredge, Esquire
Joseph M. Donley, Esquire
KITTREDGE, KAUFMAN & DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107
(215) 732-2700
Counsel of Record for Petitioner

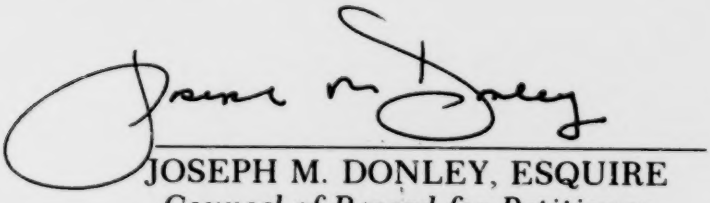
CERTIFICATE OF SERVICE

I certify that three copies of this Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class postage, prepaid this day of September, 1985, to:

John C. Sullivan, Esquire
1818 Three Penn Center Plaza
Philadelphia, PA 19102

John G. Gleeson, Esquire
Hercules Plaza
Wilmington, DE 19899

Kean K. McDonald, Esquire
700 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103



JOSEPH M. DONLEY, ESQUIRE
Counsel of Record for Petitioner

85-477

No.____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner-Appellant

v.

HERCULES INCORPORATED,
Respondent-Appellee

and

GOULD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Patrick W. Kittredge, Esquire
Joseph M. Donley, Esquire

KITTREDGE, KAUFMAN & DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107
(215) 732-2700

Counsel of Record for Petitioner

Robert Emmet Hernan, Esquire
Co-Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1159

PHILADELPHIA ELECTRIC COMPANY

v.

HERCULES, INC.

and

GOULD, INC.,

Hercules, Inc., Appellant

Appeal From the United States
District Court for the
Eastern District of Pennsylvania
D.C. Civ. No. 82-0690

Argued: December 14, 1984

Before: GARTH and HIGGINBOTHAM,
Circuit Judges, and
McCUNE, *District Judge**

(Filed May 28, 1985)

JOHN GERALD GLEESON, ESQUIRE (Argued)
HERCULES, INC.
Hercules Plaza
Wilmington, DE 19899

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*Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

JOSEPH G. MANTA, ESQUIRE
JOHN C. SULLIVAN, ESQUIRE
FRUMKIN & MANTA
Suite 1818
Three Penn Center Plaza
Philadelphia, PA 19102

Attorneys for Hercules, Inc.

JOSEPH M. DONLEY, ESQUIRE (Argued)
ROBERT EMMET HERNAN, ESQUIRE
KITTREDGE, KAUFFMAN & DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107

Attorneys for Philadelphia Electric Co.

KEAN K. McDONALD, ESQUIRE
LaBRUM & DOAK
700 IVB Building
1700 Market Street
Philadelphia, PA 19103

Attorney for Gould, Inc.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final judgment of the district court in favor of Philadelphia Electric Company ("PECO") and against Hercules, Inc. ("Hercules") in the amount of $394,910.14, and further ordering Hercules to take all appropriate action to eliminate pollution on a property owned by PECO in Chester, Pennsylvania. The case was tried to a jury on theories of public and private nuisance. For the reasons set forth in the opinion that follows, we will reverse the judgment against Hercules on PECO's claims, and vacate the injunction.

I.

Prior to October of 1971, the Pennsylvania Industrial Chemical Corporation ("PICCO") owned a tract of land abutting the Delaware River in Chester, Pennsylvania where it operated a hydrocarbon resin manufacturing plant. At the time PICCO acquired the property ("the Chester site") there was an inlet located at the southern end that opened into the Delaware River. Sometime later PICCO filled in the shoreline at the inlet and thereby created a lake ("the PICCO pond"). During the period it conducted operations on the Chester site, the evidence tended to show, PICCO deposited or buried various resins and their by-products in the PICCO pond and possibly other locations.

In 1971 PICCO ceased operations on the Chester site and sold the facility to Gould, Inc. ("Gould"). Gould did not conduct any operations on the Chester site, other than leasing certain tanks to ABM Disposal Services Company ("ABM"), which used them to store large quantities of various waste materials, though apparently not resins or resinous by-products.

In mid-1973, PECO -- which operated a plant on an adjoining piece of land -- obtained an option to purchase the Chester site from Gould. Prior to exercising its option, a PECO representative inspected the site on more than one occasion, including walking tours along the banks of the Delaware River and the banks of the PICCO pond. PECO learned that Gould's tenant, ABM, had caused a number of spills on the site, including oil spills in the pond area, and was informed that ABM was a "sloppy tenant". ABM was unable to clean up the Chester site in time to meet Gould's original deadline for vacating the premises, a condition of the PECO purchase agreement. PECO exercised its option and acquired the property in March of 1974. PECO has conducted no operations on the Chester

site, but has leased a portion of the land to American Refining Group, Inc.

In 1980 the Pennsylvania Department of Environmental Resources ("DER") discovered that resinous materials similar to those once produced by PICCO were seeping from the banks of the Delaware River at the Chester site, and that the PICCO pond was contaminated with the same material. On August 22, 1980 PECO received the following letter from a DER Water Quality Specialist:

> This is to confirm the results of an inspection conducted on July 15, 1980 . . . which revealed that a resinous material was leaching from the bank of the Delaware River from PECO property located between Jeffrey and Ward Streets.
>
> Such condition is in violation of Title 25, Chapter 101, Section 2 of the Rules and Regulations of the Department of Environmental Resources regarding Special Water Pollution Regulations.[1]
>
> During our preliminary survey of the site you stated that the property was once owned by Pennsylvania Industrial Chemical Company which operated a resin disposal lagoon on site. You mentioned that core samples had been taken of this site, that the contents of the lagoon had been pumped to a storage tank and samples of this material were being analyzed. In order that we may evaluate the impact of this material on the Delaware River we request that a copy of the core sampling results and a copy of chemical analysis of the substance be submitted to the Department. If the core sampling does not provide sufficient data, additional monitoring may be required.

---

1. These are regulations promulgated pursuant to authority granted by the Pennsylvania Clean Streams Law, 35 Pa. Cons. Stat. Ann. § 691.5 (Purdon Supp. 1983).

> It was also noted that a remnant of the resin lagoon remains on site. During our inspection you indicated that this lagoon was going to be cleaned out and abandoned. Please indicate how and when this work will be accomplished.

In response, PECO developed a plan whereby the remaining pond resin would be removed to a land fill, and the PICCO pond area would be backfilled and regraded. DER approved this plan on November 21, 1980. PECO produced evidence indicating that it incurred expenses of $338,328.69 in implementing the clean-up, and an additional $7,578 in collecting and carting away resinous material that continued to leach to the surface at various places around the Chester site during the summers of 1981-1983. PECO also introduced evidence of $67,500 in lost rentals from American Refining due to the continuing leaching.

In a letter dated March 10, 1981, DER expressed satisfaction with the clean-up of the pond area, but reported that a February 27, 1981 inspection revealed resins still on the Delaware River bank and continued leaching of resins into the River. PECO was asked to "submit in writing . . . Philadelphia Electric's position on the control or clean-up of the resin material remaining on the bank." After PECO expressed reluctance to spend any additional money on clean-up of the Chester site, DER wrote PECO again, on May 28, 1981:

> Leachate analysis of the resin on the river bank indicates that there is a leaching problem from the resin. Such discharge constitutes an unpermitted discharge to the waters of the Commonwealth and is a violation of the Clean Streams Law, subject to the penalties provided therein. It is therefore required that the resin material on the river bank be removed.

The record does not reveal that DER or PECO has taken any further action regarding the resinous material on the river bank, and PECO's witness testified at trial that the condition still existed.

On February 16, 1982, PECO instituted suit against Gould and Hercules, which had acquired the remaining assets of PICCO in 1973, in exchange for Hercules stock. (PICCO was dissolved on January 9, 1976.) Hercules cross-claimed against Gould. On cross-motions for summary judgment the district court ruled that Hercules was liable as PICCO's corporate successor under the express terms of the Agreement and Plan of Reorganization ("the Agreement") it entered into with PICCO, and because the transaction was a *de facto* merger. A jury trial was held in July of 1983. PECO, stating that discovery had shown no wrongdoing on the part of Gould, offered no evidence against Gould.[2] At trial Hercules attempted to show that the pollution was not consistent with PICCO's operations on the Chester site, but was consistent with the operations of ABM and other industrial plants in the area. At the close of evidence, the jury was instructed on principles of public and private nuisance. The jury's verdict was rendered in the form of answers to special interrogatories:

1. Do you find by a preponderance of the evidence tht PICCO caused the contamination of the property now owned by Philadelphia Electric Company? YES.

2. Do you find by a preponderance of the evidence that the contamination on the property now

---

2. After trial PECO revealed that it had actually released Gould from liability in consideration of $5,000. Though we do not approve of this lack of candor, we do not believe that Hercules was prejudiced or that reversal is required on this ground.

owned by Philadelphia Electric Company continues to pollute the groundwater or the Delaware River? YES.

3. In what amount do you award damages? $345,906.69.

4. Do you find by a preponderance of the evidence that ABM's activities contributed to the contamination of the Philadelphia Electric Company property? YES.

5. Was Gould aware of ABM's activities and permitted them to continue? NO.

Based on these answers, the district court moulded a verdict and entered judgment for PECO against Hercules in the amount of $394,910.14, which included delay damages of $49,003.45 pursuant to Pennsylvania Rule of Civil Procedure 238, entered judgment for Gould on Hercules' cross-claim, and issued an injunction as follows:

> IT IS FURTHER ORDERED and DECREED that Hercules, Inc. shall forthwith take all appropriate action to abate and eliminate the contamination on the property of the Philadelphia Electric Company located at the Chester site and abate the further pollution of the groundwater and the Delaware River adjacent to the property by collecting and removing all pollutants in accordance with all applicable rules and regulations of the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, and any other appropriate state or federal regulatory agency.

In this appeal Hercules contends, *inter alia*, that the district court erred in ruling that it was liable as PICCO's successor, and that PECO had no cause of action against it for public or private nuisance. The

parties are agreed that the substantive law of Pennsylvania governs this diversity case.

II.

"As a general rule," under Pennsylvania common law, "when one company sells or transfers all its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets." *McClinton v. Rockford Punch Press & Manufacturing Company*, 549 F. Supp. 835, 837 (E.D. Pa. 1982). Four exceptions to the general rule of nonliability are widely recognized, in Pennsylvania and elsewhere. Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation or *de facto* merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be held responsible for the debts and liabilities of its predecessor. *See Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971); *Granthum v. Textile Machine Works*, 230 Pa. Super. 199, 326 A.2d 449 (1974). *See generally* 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7122 (rev. perm. ed. 1983). "A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor." *Husak v. Berkel, Inc.*, 234 Pa. Super. 452, 457, 341 A.2d 174, 176 (1975). In addition, Pennsylvania has recently adopted the more controversial "product-line" exception in products liability cases. *See Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981); *Savini v. Kent Machine Works*, 525 F. Supp. 711 (E.D. Pa. 1981). *See generally* Comment,

Expanding the Products Liability of Successor Corporations, 27 Hast. L. Rev. 1305 (1976). In the instant case the district court found, as a matter of law, that Hercules had expressly assumed PICCO's liabilities and that the transaction amounted to a *de facto* merger. We agree with the district court as to both theories of successor liability.

A. *Express Assumption of Liability*

Article IV, paragraph 4.1 (iii) of the Agreement provided for:

> [t]he assumption by Hercules of all the debts, obligations and liabilities of Picco as of the Closing Date, excepting therefrom the liabilities arising out of the breach of any warranty of Picco contained herein, in any certificate or other instrument furnished hereunder, any misrepresentation by Picco herein, or the failure of Picco to perform under any of its agreements and contracts herein, and except liabilities of Picco set forth in subsection (iv) for which cash is specifically reserved herein.

As the district court noted, under this language Hercules broadly assumed *all* liabilitites incurred by Picco as of the closing date, subject to a few limited exceptions. In such cases, it is of no consequence that the specific liability at issue is not enumerated. *See Bouton v. Litton Industries*, 423 F.2d 643 (3d Cir. 1970); *Bippus v. Norton Company* , 437 F. Supp. 104 (E.D. Pa. 1977). Unless this liability comes within one of the express exceptions, Hercules may be held to have assumed it.

Hercules seeks to avoid this result by juxtaposing the exception for "liabilities arising out of the breach of any warranty of Picco" with Picco's warranty, in article I, paragraph 1.4 of the Agreement, that "at the date

hereof Picco has no material liabilities, contingent or otherwise, not reflected in the Picco Balance Sheet, not otherwise herein disclosed, and all such financial statements have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved." Hercules contends that in light of this warranty, it is apparent that it did not assume liabilities, such as the one at issue, that were contingent or unknown at the closing date. We find this contention unpersuasive. As we read the exception for liabilities arising out of breach of warranty by PICCO, it would seem to preserve the rights of Hercules as against PICCO in the event of a breach; it does not pertain to the rights of injured third parties.[3] Moreover, we doubt that there is a breach of the warranty here. Because, as Hercules concedes, the liability was unknown as of the date of the Agreement, PICCO could not have been responsible for disclosing it. *Cf. Bouton v. Litton Industries*, 423 F.2d at 652.

Our conclusion that Hercules' assumption of liability did not exclude liabilities that were unknown or contingent is bolstered by a comparison of the language employed here with that used in cases where such liabilities were deemed to be excluded. In *Lopata v. Bemis Company*, 383 F. Supp. 342 (E.D. Pa. 1974), *vacated*, 517 F.2d 1398 (3d Cir.), *judgment reinstated*, 406 F. Supp. 521 (1975), *aff'd*, 546 F.2d 417 (1976), the agreement at issue provided that the purchaser of the assets "shall not assume any liabilities of the seller nor take the assets subject to any liabilities whether fixed or contingent, known or unknown," except as specifically provided. *Id.* at 344.

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3. *See* Carlin v. Pennsylvania Power and Light Co., 363 Pa. 543, 545, 70 A.2d 349, 351 (1950) ("The cause of action owned by the plaintiff is distinct from the cause of action arising out of the duty of the additional defendant to idemnify the defendant.").

In *McCullough v. National Bank of Union City* , 127 Pa. Super. 452, 193 A. 65 (1937), the defendant bank purchased the assets of a closed bank and assumed responsibility for 60% of its "known, existing liabilities." In *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977) the purchaser assumed "all debts, obligations, contracts and liabilities of [the transferor] of any kind, character or description, whether accrued, absolute, contingent or otherwise, as reflected on the balance sheets, books of account and other records of [the transferor] on the date hereof." 565 F.2d at 446. This language was deemed to exclude unknown liabilities. In light of the clear and specific language that has been used to effect the exclusion of unknown or contingent liabilities in other cases, we must decline to follow Hercules' rather strained interpretation of the Agreement at issue. We conclude that Hercules has assumed any liability PICCO may have had due to pollution of the Chester site.

B. *De Facto Merger*

Judge McGlynn's excellent discussion of this theory of successor liability is worth setting out in full:

> As previously noted, the Hercules-PICCO agreement was entitled an Agreement and Plan of Reorganization. However, because of the complex nature of corporate reorganizations and acquisitions the intrinsic nature of a transaction cannot be ascertained merely from the form by which it is structured. It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent. *Knapp v. North American Rockwell Corp.* , 506 F.2d 361 (3d Cir. 1974) (Rosenn, J., concurring), *cert. denied* 421 U.S. 965, 95 S.Ct. 1955, 44 L.Ed. 2d 452 (1975).

In determining whether a particular transaction amounts to a de facto merger as distinguished from an ordinary purchase and sale of assets most courts look to the following factors:

(1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing coporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

See e.g., Shannon v. Samuel Langston Company, 379 F. Supp. 797, 801 (W.D. Mich. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98, 103-105 [(Law Div. 1970)], *aff'd*, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972); *See also Knapp*, 506 F.2d at 365.

In *Knapp*, the plaintiff was injured in 1969 when his hand was caught in a machine that had been designed and manufactured by Textile Machine Works, (TMW) and sold to plaintiff's employer in 1966 or 1967. 506 F.2d at [362]. In April of 1968,

eighteen months prior to plaintiff's injuries, TMW entered into an agreement with North American Rockwell Corp., (Rockwell) whereby Rockwell acquired substantially all of the assets and liabilities of TMW in exchange for Rockwell stock. The agreement also stipulated that TMW was to dissolve as soon as possible. *Id.* at 363. Knapp brought his action against Rockwell in 1971 alleging his injuries resulted from the negligence of TMW in designing and manufacturing the machine and that Rockwell, as TMW's successor, was liable for such injuries. The transaction between TMW and Rockwell was characterized as a sale of assets. *Id.* at [362-63].

In reversing the district court's award of summary judgment in favor of Rockwell, the Court of Appeals held that, for the purposes of determining liability for tortiously injured parties, the Rockwell-TMW transaction should be treated as a de facto merger thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to the transaction. *Id.* at 367.

While cognizant of the general rule of nonliability for a corporation which merely purchases another's assets, the *Knapp* court nevertheless looked beyond the form of the transaction. In doing so the court enumerated several factors as indicia of a de facto merger: the exchange of substantially all of TMW's assets and liabilities for Rockwell stock; the nominal amount of cash which Rockwell left with TMW to cover the expenses of the transfer with the proviso that any funds remaining after dissolution was [sic] to be returned to Rockwell; and finally, the requirement that TMW was to distribute the Rockwell stock to its

shareholders and dissolve as soon as practicable. *Id.* at 363.

> The factors which the *Knapp* court focused on in imposing liability on the successor corporation are likewise present here. The Hercules-PICCO agreement provided that Hercules was to acquire all the assets and substantially all of the liabilities of PICCO in exchange for Hercules stock; PICCO was to use its best efforts to keep its business organization intact, to keep available to Hercules the service of its present employees and to maintain its relationship with its customers and suppliers for Hercules' benefit; PICCO's management and personnel became a part of Hercules; PICCO was required, to the extent permitted by law, to transfer to Hercules the right to use its corporate name; PICCO was left with a nominal amount of money to dispose of its expenses in connection with the transaction and any money remaining was to be returned to Hercules; PICCO was required to dissolve as soon as practicable; and finally, following closing, Hercules continued to operate the PICCO plants, produce the same PICCO products and represented to PICCO's customers that PICCO resins had became a part of Hercules' Organics Department.

Philadelphia Electric Co. v. Hercules, Inc., 587 F. Supp. 144, 151-152 (E.D. Pa. 1984) (footnote omitted).

There is little that we can add to Judge McGlynn's thoughtful analysis and we adopt it as our own. Indeed, Hercules does not argue that the district court misapprehended or misapplied the elements of a *de facto* merger. Rather, Hercules argues that the district court erred in assuming that the Pennsylvania courts

would apply this doctrine in an environmental nuisance case. Hercules cites *Dawejko v. Jorgensen Steel Co., supra*, for the proposition that the Pennsylvania courts, in determining whether successor liability is appropriate, will first look to see whether the same social policy considerations underlying strict products liability are thereby promoted. Since these policies would not be promoted by imposing successor liability here, it is argued, the *de facto* merger doctrine should not be applied. Hercules' contention is entirely without merit. In *Dawejko*, the Pennsylvania Superior Court adopted a new exception to the general rule of nonliability -- the so-called "product-line" exception -- that applies *only* in products liability cases. Not surprisingly the court did consider whether the policies of strict products liability would be promoted by adopting the product-line exception, but the court made it quite clear that it was *expanding* the reach of successor liability, and not in any way limiting the scope of established exceptions:

> One may retain the traditional exceptions but expand their boundaries, so that "merger" or "continuation" are held to include cases they once would not have included. Or one may adopt a new exception, such as the product-line exception. We believe it better to adopt a new exception. . . . By adopting a new exception . . . the other exceptions then remaining, to deal with cases not so much affected by the policy considerations that have led to the rule of strict liability for defective products.

290 Pa. Super. at 25-26, 434 A.2d at 111. We believe that the *de facto* merger doctrine is supported by "social policy considerations" independent of any particular cause of action, *see In re Penn Central Securities Litigation*, 367 F. Supp. 1158, 1170 (E.D.

Pa. 1973) ("The *de facto* merger doctrine is a judge-made device for avoiding patent injustice which might befall a party simply because a merger has been called something else."), and that the Pennsylvania courts would apply it in a wide variety of cases, including this one. *See generally Farris v. Glen Alden Corp.*, 393 Pa. 427, 432, 143 A.2d 25, 28 (1958); 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 7122-7123.5 (rev. perm. ed. 1983).

III.

Having determined that Hercules may be liable as PICCO's successor for unknown and contingent liabilities, we must analyze the relationship between Hercules and PECO as that of a vendor and remote vendee of land. Hercules argues that this relationship is governed by the rule of *caveat emptor*, subject to limited exceptions not applicable here, and that a vendee has no cause of action against a vendor sounding in private nuisance for conditions existing on the land transferred. After carefully considering this question of first impression, we are persuaded that under Pennsylvania law Hercules cannot, as a matter of law, be held liable to PECO on a private nuisance theory. The Reporter's Note to *Restatement (Second) of Torts* § 352 (1965) sums up the prevailing view regarding the liability of a vendor of land:

> Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has

> been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.

See also M. Friedman, *Contracts and Conveyances of Real Property* § 1.2(n), at 37 (4th ed. 1984) ("[I]n the sale of realty this doctrine [*caveat emptor*] not only applies, it flourishes.").

As the Pennsylvania Supreme Court has said: "Generally speaking, the rule is that in the absence of fraud or mispresentation a vendor is responsible for the quality of property being sold by him only to the extent for which he expressly agrees to be responsible. . . . The theory of the doctrine is that the buyer and seller deal at arm's length, each with an equal means of knowledge concerning the subject of the sale, and that therefore the buyer should be afforded only those protections for which he specifically contracts." *Elderkin v. Gaster*, 447 Pa. 118, 124, 288 A.2d 771, 774-75 (1972) (footnote omitted). In *Elderkin* the court abolished the rule of *caveat emptor* as to the sale of new homes by a builder-vendor and, in accordance with a national trend, adopted a theory of implied warranties. *See generally* 6A *Powell on Real Property* chap. 84A (1984). But the reasoning of the *Elderkin* opinion[4] leaves us with no doubt that where, as here, corporations of roughly equal resources contract for

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4. *Elderkin*, like other decisions adopting implied warranty theories, is based on the theory that as between the builder-vendor and the home buyer, the builder-vendor is in by far the better position in terms of expertise and bargaining power. We find no reason to assume such a disparity exists in the instant case.

the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure,[5] *caveat emptor* remains the rule.

A number of general exceptions to the rule of *caveat emptor*, mostly dealing with liability for personal injuries or property damage resulting from latent dangerous conditions, have been recognized. *See Quashnock v. Frost*, 299 Pa. Super. 9, 445 A.2d 121 (1982); *Shane v. Hoffmann*, 227 Pa. Super. 176, 324 A.2d 532 (1974); *Restatement (Second) of Torts* § 353; Annot., 18 A.L.R.4th 1168 (1982); Annot., 48 A.L.R.3d 1027 (1973). PECO concedes that these exceptions do not apply in this case. (Indeed, PECO appears to argue that because the exceptions do not apply, neither does the rule. This, of course, does not follow.) PECO's tack has been to cast its cause of action for the condition of the Chester site as one for private nuisance. We, however, do not believe that PECO can escape the rule of *caveat emptor* by this route.

Restatement (Second) of Torts § 821D defines a "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." The briefs and arguments, as well as the district court's opinion, 587 F. Supp. at 152-54, give much attention to the questions of whether the condition created by Hercules on the Chester site amounted to a nuisance, and whether Hercules remains liable for the nuisance even after vacating the land. For the purposes of our decision, we may assume that Hercules created a nuisance, and that it remains liable for this condition. See *Restatement (Second) of Torts* §840A. The crucial

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5. Compare those cases holding that there are no implied warranties in the sale of unimproved land. Conklin v. Hurley, 428 So.2d 654 (Fla. 1983); Witty v. Schramm, 62 Ill. App. 3d 185, 379 N.E.2d 333 (1978); Cook v. Salishan Properties, 279 Or. 333, 569 P.2d 1033 (1977); Jackson v. River Pines, Inc., 276 S.C. 29, 274 S.E.2d 912 (1981).

and difficult question for us is *to whom* Hercules may be liable.

The parties have cited no case from Pennsylvania or any other jurisdiction, and we have found none, that permits a purchaser of real property to recover from the seller on a private nuisance theory for conditions existing on the very land transferred, and thereby to circumvent limitations on vendor liability inherent in the rule of *caveat emptor*. In a somewhat analogous circumstance, courts have not permitted *tenants* to circumvent traditional limitations on the liability of *lessors* by the expedient of casting their cause of action for defective conditions existing on premises (over which they have assumed control) as one for private nuisance. *See Collette v. Piela*, 141 Conn. 382, 106 A.2d 473 (1954); *Clerken v. Cohen*, 315 Ill.App. 222, 42 N.E.2d 846 (1942). In *Harris v. Lewistown Trust Co.*, 326 Pa. 145, 191 A. 34 (1937), *overruled in part on other grounds, Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968), the Supreme Court of Pennsylvania held that the doctrine that a landlord not in possession may be liable for injuries resulting from a "condition amounting to a nuisance" is confined to "the owners or occupants of near-by property, persons temporarily on such property, or persons on a neighboring highway or other places." 326 Pa. at 153, 191 A. at 38.[6] Recovery on this theory was not available to tenants or their invitees: "A breach of duty owed to one class of persons cannot create a cause of action in favor of a person not within the class. A plaintiff must show that as to him there was a breach of duty." 326

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6. *Cf. Restatement (Second) of Torts* § 840A and comment c thereto ("If the vendor or lessor has himself created on the land a condition that results in a nuisance, ... *his responsibility toward those outside of his land* is such that he is not free to terminate his liability to them . . . by passing the land itself on to a third person.") (emphasis added).

Pa. at 152, 191 A. at 38.[7] Similarly, under the doctrine of *caveat emptor* Hercules owed only a limited duty to Gould and, in turn, to PECO. PECO concedes that this duty was not violated. PECO cannot recover in private nuisance for the violation of a duty Hercules may have owed to others -- namely, its neighbors.[8]

We believe that this result is consonant with the historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses. *See Essick v. Shillam*, 347 Pa. 373, 376, 32 A.2d 416, 418 (1943) ("An owner has a right, barring malice and negligence, to any use of his property, unless by its continuous use he prevents *his neighbors* from enjoying the use of their property to their damage.") (emphasis added).[9] All of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to

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7. The limitation on landlord liability that the *Harris* case imposed -- preventing recovery by a lessee injured due to a condition the landlord promised to repair -- was much criticized and eventually overruled by *Rettmeyer*. We believe, however, that insofar as it stands for the proposition that salutary limitations on vendor or lessor liability to vendees and lessees cannot be circumvented by asserting a breach of a duty owed to third parties, *Harris* reflects sound tort theory.

8. The record shows that prior to its purchase of the Chester site, PECO also owned an adjoining piece of land, and thus was a neighbor of Hercules. PECO does not, however, allege that pollution of the Chester site interfered with its use and enjoyment of this adjoining site.

9. *See also* 5 *Powell on Real Property* § 704, at 320 ("The basic criterion in the whole law of private nuisance is reasonableness of conduct. . . . The conclusion of 'unreasonableness' depends then upon liability-inviting conduct of the defendant plus a finding that this conduct violates a protected interest of the *neighbor-plaintiff*.")

achieve efficient and equitable solutions to problems created by *discordant* land uses.[10] In this light nuisance law can be seen as a complement to zoning regulations, *see* Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 Wis. L. Rev. 440, 452 ("[T]he state in nuisance cases is exercising, through the judicial arm, the same basic power of the sovereign that it exercises through the legislative arm in zoning."), and not as an additional type of consumer protection for purchasers of realty. Neighbors, unlike the purchasers of the land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation. The record shows that PECO acted as a sophisticated and responsible purchaser -- inquiring

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(emphasis added); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 Va. L. Rev. 1299, 1319 (1977) ("An interference is not a nuisance unless, among other things, it *substantially* interferes with the use and enjoyment of *neighboring land*.") (emphasis added); 2 F. Pollock & F. Maitland, *The History of English Law* 53 (2d ed. 1911) (Nuisance is caused "by things erected, made, or done *not on the soil possessed by the complainant but on neighboring soil*, ... Law endeavours to protect the person who is seized of land, not merely in the possession of the land, but in the enjoyment of those rights *against his neighbours* which he would be entitled to were he seized under a good title.") (emphasis added).

10. *See generally* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973); Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075 (1980); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 Va. L. Rev. 1299 (1977); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. Rev. 219 (1978).

into the past use of the Chester site, and inspecting it carefully. We find it inconceivable that the price it offered Gould did not reflect the possibility of environmental risks, even if the exact condition giving rise to this suit was not discovered.

Where, as here, the rule of *caveat emptor* applies, allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred -- where there has been no fraudulent concealment -- would in effect negate the market's allocations of resources and risks, and subject vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to remote vendees. To so extend private nuisance beyond its historical role would render it little more than an epithet, "and an epithet does not make out a cause of action." *Miller v. Morse*, 9 A.D.2d 188, 192 N.Y.S.2d 571, 576 (1959). Such an extension of common law doctrine is particularly hazardous in an area, such as environmental pollution, where Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities. We conclude that PECO did not have a cause of action against Hercules sounding in private nuisance.

IV.

The doctrine of public nuisance protects interests quite different from those implicated in actions for private nuisance, and PECO's claim for public nuisance requires separate consideration. Whereas private nuisance requires an invasion of another's interest in the private use and enjoyment of land, a public nuisance is "an unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B(1). An action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property

rights.[11] As William Prosser once wrote:

> There are, then, two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed. A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure. Although as in the case of other crimes, the normal remedy is in the hands of the state, a public nuisance may also be a private one, when it interferes with private land. The seeds of confusion were sown when courts began to hold that a tort action would lie even for a purely public nuisance if the plaintiff had suffered "particular damage."

Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966) (footnotes omitted). In analyzing the public nuisance claim, we are not concerned with the happenstance that PECO now occupies the very land PICCO occupied when it allegedly created the condition that has polluted the Delaware River

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11. Thus, commercial fishermen and clam diggers operating in public waters can recover on a public nuisance theory for harm to the waters and marine life caused by oil discharged from a tanker in transit. *See* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973).

waters,[12] or that the continuing source of that pollution is located on that land.[13] The question before us is whether PECO has *standing* to bring an individual action for damages or injunctive relief for interference with a public right.

Restatement (Second) of Torts § 821C(1) provides:

> In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

The same requirements apply to individual plaintiffs seeking injunctive relief. *Restatement (Second) of Torts* § 821C(2); Prosser, *supra*, 52 Va. L. Rev. at 1006. PECO argues that the expense it incurred in cleaning up the offending condition constituted the harm requisite for standing to sue for public nuisance. We disagree. Though pecuniary harm certainly may be harm of a different kind from that suffered by the general public, *see Restatement (Second) of Torts* § 821C comment h,[14] we find in this case no allegation or evidence that PECO suffered this harm "exercising

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12. Though Hercules disputes it, we may assume that the jury could properly have found that the leaching of resins into the Delaware River was a public nuisance and that PECCO was responsible for it.

13. Accordingly, we reject Hercules' contentions that the limitations on private nuisance discussed in Part III, *supra*, apply equally to public nuisance, and that it is improper for a claimant to recover for or seek abatement of public nuisance when the alleged cause of the public nuisance is its own property.

14. It may be that under Pennsylvania law harm of a *magnitude* greater than that suffered by the general public is sufficient to confer standing. *See* Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises,

the right common to the general public that was the subject of interference." The public right that was interfered with was the right to "pure water". *See Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392, 412-13, 319 A.2d 871, 882 (1974); Pa. Const. art. I, § 27. PECO does not allege that it used the waters of the Delaware River itself, or that it was directly harmed in any way by the pollution of those waters. Thus, this is not a case "where an established business made commercial use of the public right with which the defendant interfered." Prosser, *supra*, 52 Va. L. Rev. at 1013-14 (footnote omitted). If PECO -- as a riparian landowner -- had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance. But the condition of the Chester site was not the *result* of the pollution, it was the *cause* of it. DER required PECO, as owner of the Chester site, to remove the sources of the pollution. PECO has been specially harmed only in the exercise of its private property rights over the Chester site. PECO has suffered no "particular damage" in the exercise of a right common to the general public, and it lacks standing to sue for public nuisance.

V.

PECO argues that even if, as we have now held, it had no cause of action against Hercules for public or

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428 Pa. 350, 360, 237 A.2d 342, 348 (1968). This distinction is not, however, important in the instant case. As the discussion that follows points out, even if PECO has suffered a harm both different in kind and greater in degree than that suffered by the general public, it has not suffered that harm in the exercise of a right common to the general public. *Cf.* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (businesses operating on beach did not have standing to sue for pollution of swimming waters, even though they lost customers as a result.).

private nuisance, insofar as the judgment of the district court assessed damages against Hercules it should be affirmed on common law principles of indemnification. The short answer to PECO's contention is that under Pennsylvania law a cause of action for indemnity between jointly liable defendants and a plaintiff's cause of action for the underlying wrong are entirely distinct, *see Carlin v. Pennsylvania Power and Light Company*, 363 Pa. 543, 70 A.2d 349 (1950), and as an appellate court we should be chary of upholding a judgment on the basis of a *cause of action* that was neither pleaded, proved, nor submitted to the jury by the district court. Perhaps this would be possible were there a complete identity of factual issues,[15] but a brief review of the principles of indemnification show that such is not the case here.

Under Pennsylvania law, the right to indemnity "enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation to pay damages occasioned by the negligence of another." *Burbage v. Boiler Engineering & Supply Company*, 433 Pa. 319, 326, 249 A.2d 563, 567 (1969). Under a threat of legal action by the DER pursuant to the Pennsylvania Clean Streams Law, PECO negotiated and carried out a plan to clean up the Chester site. (The jury's verdict against Hercules reflected the cost PECO incurred in implementing the clean-up.) PECO was not, however, required to fight DER to a final judgment in order to be eligible for

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15. "An appellate court may affirm a result reached by the district court on different reasons, *as long as the record supports the judgment*." Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1145 n.1 (3d Cir. 1983) (emphasis added). Where, as here, a case is tried before a jury under one cause of action, it seems most unlikely that the record could support affirmance of a judgment for the plaintiff on the basis of an entirely distinct cause of action.

indemnity. It is not penalized for acting responsibly. "To recover indemnity where there has been such a voluntary payment, however, it must appear that the party paying was *himself legally liable* and could have been compelled to satisfy the claim." *Tugboat Indian Company v. A/S Ivarans Rederi*, 334 Pa. 15, 21, 5 A.2d 153, 156 (1939)(emphasis in original).[16]

"Thus, the indemnitee may be required to establish his case against the indemnitor in the same way that the claimant against him would have been obligated to do, namely, by a preponderance of the evidence. A mere showing by a party seeking indemnity that there was a reasonable possibility that it might have been held liable if it had not settled . . . is not sufficient to recover indemnity; actual legal liability must be shown." 41 Am. Jur. 2d *Indemnity* § 33, at 723 (1968) (footnotes omitted). *See also Martinique Shoes v. New York Progressive Wood Heel Company*, 207 Pa. Super. 404, 217 A.2d 781 (1966). The issue of liability, of PECO or Hercules, under the Clean Streams Law pursuant to which the DER purported to act,[17] has

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16. It is further required that the party seeking indemnity give "proper notice" and "establish that the settlement was fair and reasonable." *Id.* Hercules has not disputed that it was informed of PECO's negotiations with DER, and that the amounts PECO expended in cleaning up the Chester site were reasonable

17. The Clean Streams law provides that "[n]o person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department [DER] or such person or municipality has first obtained a permit from the department. . . . A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance." 35 Pa. Cons. Stat. Ann. § 691.307 (Purdon Supp. 1983).

not been tried. Though the Clean Streams Law declares that all violations are nuisances, that does not mean that all public nuisances give rise to liability under this statute. The jury has not been instructed as to the elements of such liability[18] and its answers to the special interrogatories cannot be transmuted into findings on this issue.[19] Thus, we cannot on the basis

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It is doubtful that DER could have compelled PECO to clean up the Chester site on a common law public nuisance theory, since the common law, in contrast to the Clean Streams Law, imposed liability only on those whose conduct (even if without fault) had been a legal cause of the nuisance, and not simply on the basis of ownership of the offending land. *Compare* Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. 496, 509-510, 353 A.2d 471, 478-79 (1976), *aff'd*, 472 Pa. 115, 371 A.2d 461, *appeal dismissed*, 434 U.S. 807 (1977), *with* National Wood Preservers v. Commonwealth, 489 Pa. 221, 237-240, 414 A.2d 37, 45-47, *appeal dismissed*, 449 U.S. 803 (1980).

18. PECO's eleventh-hour attempt to add a claim against Hercules based on the Clean Streams Law was denied. Nonetheless, the jury was instructed as follows:

> There is a statute of Pennsylvania which provides it shall be unlawful for any person, and person includes corporations, or a municipality, to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from the property owned or occupied by such person or municipality, any substance of any kind or character resulting in pollution.
>
> Now, if you find there was a violation of this statute, you must find there was created a public nuisance as a matter of law.

This instruction, dealing with the public nuisance claim, cannot be construed as placing liability under the Clean Streams Law at issue. Though we need not reach the question, this instruction may have been so incomplete as to be prejudicial error.

19. Nor are DER's allegations, contained in its letters to PECO, *see* Part I *supra*, conclusive of the issue of liability under the Clean Streams Law.

of this record uphold the award of damages on PECO's indemnification theory.

Even if the record clearly supported the conclusion that PECO "could have been compelled" through legal action by DER pursuant to the Clean Streams Law to incur these expenses in cleaning up the condition created by PICCO, it is not at all clear that under Pennsylvania law Hercules is liable over to PECO for indemnity. "The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by law to an injured party." *Burbage v. Boiler Engineering & Supply Company*, 433 Pa. at 326, 249 A.2d at 567.

> The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence but rather on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligations owed by each of the wrongdoers to the injured person. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal obligation between the parties or arising from some positive rule of statutory or common law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

433 Pa. at 326-67, 249 A.2d at 567 (emphasis in original). There can be no indemnity as between parties that each bear primary responsibility for a wrong, regardless of their relative degrees of fault. Here we have the converse situation. Both PECO and Hercules are liable for the condition of the Chester site, if at all, vicariously -- PECO as the successor to PICCO in title to the land, Hercules as the successor to

PICCO's other assets. We have found no Pennsylvania case determining where the risk of loss falls in such circumstances. At least one court has held that there can be no common law indemnification as between two parties whose liability is vicarious. *See Liberty Mutual Insurance Company v. Curtis Noll Corporation*, 112 Mich. App. 182, 315 N.W.2d 890 (1982) (two "product-line" successors to company that manufactured defective product). Arguably, the liability of a party that has constructively merged with a polluter is of a character or kind different from that of a party who succeeded to title in the offending land. We need not, however, attempt to ascertain what general rule the Supreme Court of Pennsylvania would adopt. "Indemnity turns upon what is equitable and fair in measuring the comparative responsibilities of these defendants, should both be held liable." *District of Columbia v. Nordstrom*, 327 F.2d 863, 867 (D.C. Cir. 1963); *see also United States v. Savage Truck Line*, 209 F.2d 442, 447 (4th Cir. 1953) ("[T]he inquiry is always whether the difference in the gravity of the faults of the participants is so great as to throw the whole loss upon one."), *cert. denied*, 347 U.S. 952 (1954). In the special circumstances of this case -- where the Chester site had been sold by PICCO well before the acquisition of PICCO's other assets by Hercules, and where PECO had an opportunity to protect itself through inspection and negotiation -- neither considerations of equity nor considerations of which party was best situated to prevent the pollution of the Delaware River waters compel the conclusion that the entire loss ought to be shifted from PECO to Hercules. Indeed, essentially the same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss to Hercules on an indemnity theory. We conclude that the judgment of the district court

cannot be affirmed, insofar as it assessed damages, on a theory of common law indemnification.

We emphasize that our decision today should not be interpreted as standing for the general proposition that a party that contaminates land, or the successors to its assets, can escape liability by the expedient of selling the land. To the contrary, it would seem that there are many avenues by which such a party may be held accountable.[20] We hold only that in this case the purchaser of that land, PECO -- though we recognize that it acted as a responsible corporate citizen -- had no cause of action against the vendor's successor, Hercules, for private nuisance, public nuisance, or common law indemnity.

CONCLUSION

For the foregoing reasons, the injunction requiring Hercules to clean up the Chester site will be vacated, and the judgment of the district court on PECO's claims against Hercules will be reversed.

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20. For example, Hercules could be liable to neighboring landowners in private nuisance, or to users of Delaware River waters in public nuisance. DER or the federal Environmental Protection Agency may be able to proceed directly against Hercules on statutory or public nuisance theories.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INCORPORATED	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

MEMORANDUM OF DECISION

McGLYNN, *J.* February 22, 1984

In April of 1980 the Commonwealth of Pennsylvania, Department of Environmental Resources, (DER), discovered a hydrocarbon resinous material, which it deemed to be a pollutant, on property owned by Philadelphia Electric Company, (PECO), in Chester, Pennsylvania, (Chester Site). The DER required PECO to remove this resinous material from the property and the banks of the Delaware River.[1]

In February of 1982, PECO brought this suit claiming negligence, private nuisance and public nuisance against Hercules Incorporated, (Hercules), on the ground that Hercules' predecessor in interest, Pennsylvania Industrial Chemical Corporation, (PICCO), had caused the contamination during its operation of a petrochemical plant at the Chester Site in the period from 1945 to 1971. Since PICCO had sold the property to Gould, Inc., (Gould), in 1971, who thereafter sold to PECO in 1974, PECO's complaint also included claims of nuisance, deceit and/or misrepresentation against Gould, on the ground that Gould contributed to the contamination and/or knew of the contamination but did not

1. DER issued a citation against PECO on August 22, 1980 for violations of the Clean Streams Law. Pa. Stat. Ann. tit. 35, §691.01 et seq.

disclose this condition when it sold the property to PECO in 1974. [2] Both Hercules and Gould denied the claims of PECO and cross-claimed against each other. Jurisdiction of the case was based upon diversity of citizenship between the parties. See 28 U.S.C. § 1332 (West Supp. 1983). After a five day trial, the jury returned a verdict in favor of PECO[3] and in favor of Gould on the cross-claims.

Presently before the court are Hercules' motions for judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b), and, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59. Generally, a jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The court may not substitute its own judgment for that of the jury merely because the court may have reached a different conclusion. To grant a motion for judgment n.o.v., the court must find, as a matter of law, that the plaintiff failed to adduce sufficient facts to justify the verdict. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970).

However, a motion for a new trial, unlike a motion for a judgment n.o.v., does not seek a final judgment but another trial. Thus a motion for a new trial is within the sound discretion of the trial judge and should be granted only when the verdict is palpably contrary to the clear weight of the evidence or when a miscarriage of justice has occurred. *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 88-89 (3d Cir. 1960), *cert. denied*, 364 U.S. 835

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2. At trial, PECO presented no evidence against Gould, therefore at the close of PECO's case I granted Gould's motion for a directed verdict pursuant to Fed. R. Civ. P. 50(a).

3. Prior to trial the parties filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56 on the issue of corporate successor liability. I denied Hercules' motion and granted PECO's motion holding that Hercules was the successor in interest of PICCO.

(1960); J. Moore & J. Wicker, 6A *Moore's Federal Practice* ¶59.08 (2d ed. 1983). For the reasons set forth herein, Hercules' motions will be denied.

I. CORPORATE SUCCESSOR LIABILITY

Hercules' first argument is that the court erroneously denied its motion for summary judgment on the issue of corporate successor liability. The inquiry regarding corporate successor liability commences with Pennsylvania law, for it controls the outcome of this diversity suit. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

The general rule in Pennsylvania is that when one corporation merely sells or transfers all of its assets to a successor corporation, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets. *Husak v. Berkel Incorporated*, 234 Pa. Super. 452, 341 A.2d 174, 176 (1975). There are, however, certain exceptions to this rule. Liability for obligations of a selling corporation may be imposed on the purchasing corporation when: (1) the purchaser expressly or impliedly agrees to assume such obligation; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is fraudulently entered into to escape liability. *See Shane v. Hobam, Incorporated*, 332 F. Supp. 526, 527 (E.D. Pa. 1971). A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor. *See Lopata v. Bemis Co., Inc.*, 383 F.Supp. 342 (E.D. Pa. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98 (1970). Additionally, Pennsylvania has recently adopted a product-line exception. *Dawejko v. Jorgensen Steel Co.*,

290 Pa. Super. 15, 434 A.2d 106, 111 (1981); *Amader v. Pittsburgh Corning Corp.*, 546 F. Supp. 1033 (E.D. Pa. 1982).

In order to determine whether the sale of assets in this case falls within one of the six exceptions to the general rule of nonliability it will be necessary to examine the circumstances of the sale of PICCO assets. It is clear that if one of these exceptions apply, Hercules can be held liable for the acts of its predecessor in interest.[4] *Shane*, 332 F. Supp. at 527.

The contract of sale between Hercules and PICCO is entitled an Agreement and Plan of Reorganization (Agreement). After setting forth the warranties of the respective corporations, the Agreement provides in Article IV §4.1 that PICCO was to convey:

> all of its properties and assets of every kind and description as a going concern together with but not limited to cash, monies on deposit, goodwill, including the right to use of the name PICCO, customer lists, credit and sales records and all other interests to which it has any right by ownership, use or otherwise . . .
>
> . . . [in exchange for 240,000 shares of common stock of Hercules[5] and] . . .
>
> (ii) The assumption by Hercules of any and all obligations and liabilities of PICCO under the various agreements, contracts, leases, licenses and other

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4. Hercules' claim that PECO brought this action beyond the applicable statute of limitations is without merit since PECO sued Hercules, not its predecessor PICCO. *See Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Pa. Stat. Ann. tit. 15 §2111 (Purdon 1983).

5. As a result of a subsequent stock split by Hercules, PICCO received 480,000 shares of Hercules stock which was distributed to its shareholders.

writing referred to in Article I herein, including those specifically excepted from the representations in Article I; and

(iii) The assumption by Hercules of all the debts, obligations and liabilities of PICCO as of the Closing Date, excepting therefrom the liabilities arising out of the breach of any warranty of PICCO contained herein, in any certificate or other instrument furnished hereunder, any misrepresentation by PICCO herein, or the failure of PICCO to perform under any of its agreements and contracts herein, and except liabilities of PICCO set forth in subsection (iv) for which cash is specifically reserved herein.

In light of the exceptions to nonliability for a corporate purchaser of assets, the threshold question which this court must address is whether Hercules either expressly or impliedly assumed the instant liability when it entered into this contract with PICCO.

A buyer of assets can avoid the implied assumption of liabilities by enumerating liabilities assumed and explicitly excluding the assumption of liabilities not enumerated. *Klobendanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 822 (D. Col. 1968); *cf. Menacho v. Adamson United Co.*, 420 F. Supp. 128, 133 (D.N.J. 1976), *citing McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 563, 264 A.2d 98, 102 (Super Ct. 1970), *aff'd* 118 N.J. Super. 480, 288 A.2d 588 (Super Ct. App. Div. 1972). In the instant contract, however, Hercules broadly assumed all of PICCO's liabilities with certain limited exceptions. Therefore, unless one of the exceptions apply, Hercules can be held to have assumed the liability at issue.

Citing *Neville Chemical Co. v. Union Carbide Corporation*, 422 F.2d 1205 (3d Cir. 1970) and *Husak v. Berkel, Incorporated*, 234 Pa. Super. 452, 341 A.2d 174 (1975), Hercules maintains, however, that the law of

Pennsylvania supports the proposition that assumptions of liability are to be strictly construed in favor of nonliability. I do not agree.

In *Neville*, the plaintiff, a manufacturer of hydrocarbon resins, brought an action against the defendant, a petrochemical company, on the basis of negligence and breach of express and implied warranties for its failure to notify plaintiff of changes made in its process of manufacturing unsaturated oil for plaintiff, where such changes caused plaintiff's final product to give off an intolerable odor. Having concluded that there was sufficient evidence to uphold the jury's verdict that the defendant was negligent, the *Neville* court was faced with the question of whether the contract which the parties entered into insulated the defendant from liability for its *own* negligence.[6] *Id.* at 1216. (emphasis added). In finding that the contract clause did not exculpate the defendant from liability for its own negligence the *Neville* court held that while the general law of Pennsylvania is that a private party may validly contract to relieve

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6. The pertinent language of the *Neville* contract provides:
Paragraph 7

> Failure of Buyer to give notice of any claim with respect to any material delivered hereunder within fifteen (15) days after the receipt of such material shall be an unqualified acceptance of such material and a waiver by Buyer of all claims with respect thereto. Buyer assumes all risk and liability for the results obtained by the use of any material delivered hereunder in manufacturing processes of Buyer or in combination with other substances. No claim of any kind, whether as to material delivered or for nondelivery of material, shall be greater in amount than the purchase price of the material in respect of which such claim is made.

In the first sentence of Paragraph 9 of the contract, it is provided:

> This Agreement contains all of the representations and agreements between the parties hereto and no warranties shall be implied.

Neville, 422 F.2d at 1216.

himself from liability for the consequences of its own negligent acts, these contracts are not favored by the law and will be strictly construed with every doubt resolved against the party seeking their protection. *Id.* at 1221.

Likewise, Hercules' reliance on *Husak v. Berkel, Incorporated*, 234 Pa. Super. 452, 341 A.2d 174 (1975), is misplaced. In *Husak* the plaintiff brought suit against Berkel seeking damages for personal injuries he sustained from a defective food grinding machine which plaintiff alleged Berkel's predecessor company had manufactured. Berkel, in turn, joined SCM as an additional defendant claiming that SCM not Berkel had succeeded to the liabilities of the manufacturer of the defective food grinding machine. 341 A.2d at 176. SCM moved for summary judgment on the basis of corporate successor liability. The facts which were established with respect to this issue demonstrated that SCM was indeed the successor to the manufacturer of the defective machine. *Id.* Nonetheless, SCM argued that Berkel's predecessor had assumed the liability for the injury when it purchased the assets and liabilities of the division of the company which had manufactured the defective machine.[7] On the basis of these facts the lower court granted SCM's summary judgment motion. On appeal, the Superior Court of Pennsylvania determined that although SCM would ordinarily be held liable on these claims as the successor of the company which manufactured the machine the question was whether, in light of the contract clause, Berkel's predecessor had assumed the liability for

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7. The contract entered into between SCM's and Berkel's predecessors in interest which SCM claimed insulated it from liability for the disputed injury provided in pertinent part that:

> . . . [Berkel] . . . agrees to assume all liabilities, obligations, contracts, orders for the purchase of material and warranties of . . . SCM . . . made in connection with the manufacture and sale of products assigned hereunder to . . . Berkel . . . as part of the commercial and industrial line.

Husak, 341 A.2d at 177.

the instant injury. *Id.* at 177. In reversing the trial court's award of summary judgment, the court found that the disputed contractual clause lacked sufficient precision to meet the standards required to relieve SCM, as a matter of law, from liability for negligence or strict liability in connection with the production of a defective machine manufactured by its predecessor. *Id.* at 178.

In both *Neville* and *Husak* the court strictly construed a contract where one party to the contract sought to insulate itself from liability for its own negligent acts. This is not the situation before the court today, however, and therefore neither of these cases are controlling here. Thus the only question is whether one of the exceptions to Hercules' broad assumption of liability applies.

The gravamen of Hercules' claim of nonliability as the successor of PICCO is that PICCO breached its warranty regarding the accuracy of its financial statements when it failed to include the instant liability on its balance sheet at the time of closing. However, this liability was unknown at the time of sale and, therefore, could not have been reflected in any financial statement. Nonetheless, Hercules argues that its contract with PICCO was very clear in this regard and because the instant liability was not disclosed, it was not assumed.

Bouton v. Litton Industries, Inc., 423 F.2d 643 (3d Cir. 1970) is instructive on this issue. In *Bouton* the selling corporation, McKiernan-Terry, (M-T), entered into an agreement and plan of reorganization in September of 1962 with Litton Industries, Inc., (Litton), wherein Litton acquired all the assets, business and goodwill of M-T in exchange for Litton stock and the assumption by Litton of certain M-T liabilities. *Id.* at 645. Plaintiffs, trustees in liquidation M-T, brought a motion for summary judgment against Litton arguing that Litton was obligated, by contract, to assume the defense of certain actions brought against M-T and to pay any judgments arising therefrom. *Id.* at 646. The disputed action, which is pertinent to the instant case, involved two personal

injury claims which arose out of accidents allegedly caused by the failure of aircraft arresting engines made and sold by M-T in 1958. These claims occurred in 1963 and 1964 and were therefore unknown liabilities at the time of closing. *Id.* at 645.

On appeal from the district court's award of summary judgment in favor of the plaintiff, Litton argued that because the liabilities for the personal injuries were not reflected in M-T's balance sheet, M-T breached its warranty and thus Litton should not be held liable for the injuries. In affirming the district court's decision, the Court of Appeals dismissed Litton's argument stating:

> The only facet of the agreement to which Litton can point with even slight comfort in support of its contentions that it did not assume the obligation to insure against or pay the product liability claims is the absence of an express reference in the contract to such claims arising from future accidents. That absence is not significant. The draftsman throughout referred to broad categories of liabilities, not to narrow specifics.

Id.

Similarly, the court in *Bippus v. Norton Co.*, 437 F. Supp. 104 (E.D. Pa. 1977), when faced with cross-motions for summary judgment on the issue of corporate successor liability, found that the absence of a reference to a product liability claim in an agreement for acquisition was not a bar to holding the successor corporation liable for the injuries. *Id.* at 107. The *Bippus* court pointed to the broad categories of liabilities assumed and concluded that the absence of a specific reference to product liability was not significant. *Id.*

In the instant case the Hercules-PICCO contract provided for the broad assumption of liabilities with certain limited exceptions. As such, Hercules' claim that it did not assume the liability for environmental pollution

because it was not included in PICCO's balance sheet at closing is without merit and, accordingly, I conclude that successor liability can be imposed upon Hercules.

Moreoever, successor liability can be found on the additional ground that the sale of assets was a de facto merger.

As previously noted, the Hercules-PICCO agreement was entitled an Agreement and Plan of Reorganization. However, because of the complex nature of corporate reorganizations and acquisitions the intrinsic nature of a transaction cannot be ascertained merely from the form by which it is structured. It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent. *Knapp v. North American Rockwell Corp.*, 506 F. 2d 361 (3d Cir. 1974) (Rosenn, J., concurring), *cert. denied* 421 U.S. 965 (1975).

In determining whether a particular transaction amounts to a de facto merger as distinguished from an ordinary purchase and sale of assets most courts look to the following factors:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

See e.g., Shannon v. Samuel Langston Company, 379 F. Supp. 797, 801 (W.D. Mich. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98, 103-105, *aff'd*, 118 N.J. 480, 288 A.2d 585 (App. Div. 1972); *See also Knapp*, 506 F.2d at 365.

In *Knapp*, the plaintiff was injured in 1969 when his hand was caught in a machine that had been designed and manufactured by Textile Machine Works, (TMW) and sold to plaintiff's employer in 1966 or 1967. 506 F.2d at 361. In April of 1968, eighteen months prior to plaintiff's injuries, TMW entered into an agreement with North American Rockwell Corp., (Rockwell) whereby Rockwell acquired substantially all of the assets and liabilities of TMW in exchange for Rockwell stock. The agreement also stipulated that TMW was to dissolve as soon as possible. *Id.* at 363. Knapp brought his action against Rockwell in 1971 alleging his injuries resulted from the negligence of TMW in designing and manufacturing the machine and that Rockwell, as TMW's successor, was liable for such injuries. The transaction between TMW and Rockwell was characterized as a sale of assets. *Id.* at 361.

In reversing the district court's award of summary judgment in favor of Rockwell, the Court of Appeals held that, for the purposes of determining liability for tortiously injured parties, the Rockwell-TMW transaction should be treated as a de factor merger thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to the transaction. *Id.* at 367.

While cognizant of the general rule of nonliability for a corporation which merely purchases another's assets, the *Knapp* court nevertheless looked beyond the form of

the transaction. In doing so the court enumerated several factors as indicia of a de factor merger: the exchange of substantially all of TMW's assets and liabilities for Rockwell stock; the nominal amount of cash which Rockwell left with TMW to cover the expenses of the transfer with the proviso that any funds remaining after dissolution was to be returned to Rockwell; and finally, the requirement that TMW was to distribute the Rockwell stock to its shareholders and dissolve as soon as practicable. *Id.* at 363.

The factors which the *Knapp* court focused on in imposing liability on the successor corporation are likewise present here. The Hercules-PICCO agreement provided that Hercules was to acquire all the assets and substantially all of the liabilities of PICCO in exchange for Hercules stock; PICCO was to use its best efforts to keep its business organization intact, to keep available to Hercules the service of its present employees and to maintain its relationship with its customers and suppliers for Hercules' benefit; PICCO's management and personnel became a part of Hercules; PICCO was required, to the extent permitted by law, to transfer to Hercules the right to use its corporate name; PICCO was left with a nominal amount of money to dispose of its expenses in connection with the transaction and any money remaining was to be returned to Hercules; PICCO was required to dissolve as soon as practicable; and finally, following closing, Hercules continued to operate the PICCO plants, produce the same PICCO products and represented to PICCO's customers that PICCO resins had become a part of Hercules' Organics Department.[8]

Despite the factual similarity between *Knapp* and the instant case Hercules argues, relying on *Terry v. Penn Central Corp.*, 527 F. Supp. 118, *aff'd* 668 F.2d

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8. *See* Summary Judgment Motion Exhibits P-D, P-E, P-F, & P-J.

188 (3d Cir. 1981), that Pennsylvania has rarely invoked the de facto merger doctrine. Hercules' reliance on *Terry* is misplaced.

In *Terry* the plaintiff shareholders sought to enjoin defendant, Penn Central, through a subsidiary, from proceeding with an acquisition of defendant, Colt Industries, unless and until the plaintiffs were afforded the right to dissent and vote. *Id.* at 120. Plaintiffs claimed that the acquisition amounted to a de facto merger. *Id.* at 132. Faced with the issue of the rights of dissenting shareholders, Judge Pollak refused to apply the de facto merger exception in light of legislative changes which restricted the availability of that doctrine in dissenting shareholder cases. *Id.* at 133. However, in reaching this conclusion, Judge Pollak pointed out the obvious distinction:

> The question in . . . [*Knapp*] . . . was one of essentially the survivorship of tort liability and one would certainly hope that courts would look to that issue in an entirely different way from the analysis that goes to determining the rights of shareholders to dissent and to vote.

Id. at 134.

After a careful examination of the substance of the transaction between Hercules and PICCO, it was my conclusion that not only did Hercules assume the liabilities of PICCO but also that the Hercules-PICCO transaction constituted a de facto merger. Therefore, Hercules' motion for summary judgment on this issue was denied and PECO's motion was granted.

II. NUISANCE CLAIMS

Hercules' second contention in support of its motion for judgment n.o.v. and/or in the alternative for a new trial is that, as a matter of law, PECO is not entitled to nuisance damages.

The essence of a nuisance is an interference with the use and enjoyment of land. W. Prosser, *Handbook of the Law of Torts*, §89, at 591 (4th ed. 1971). As a general rule, one who creates a nuisance is liable for the resulting damages and ordinarily his liability continues for as long as the nuisance continues. *Smith v. Elliot*, 9 Pa. 345 (1848); *Ryan v. Commonwealth Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1977); *See New Jersey Dept. of Environmental Protection v. Exxon Corp.*, 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977).

Relying on *Bouy v. Fidelity-Phila. Trust Co.*, 338 Pa. 5, 12 A.2d 7 (1940), Hercules' first argument is that PECO is not entitled to relief because the injury sustained was not transmitted beyond the land where the objectionable condition existed.

The reliance on *Bouy* is misplaced. In the first place, Bouy was bottomed on *Harris v. Lewistown*, 326 Pa. 150, 191 A. 37 (1937) which was expressly overruled by *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1969). Secondly, unlike the physical injury problem faced by the court in *Bouy* this case involves pollution, the effects of which were transmitted "beyond the boundaries of the land upon which the objectionable condition exists." *Bouy*, 338 Pa. at 8.

The Clean Streams Law (Pa. Stat. Ann. tit. 35, §691.1 et seq, Purdon 1977) expands the law of nuisance in the area of environmental pollution to impose liability on an owner or occupier of land for pollution which exists on his land irrespective of who was responsible for creating it. *National Wood Preservers, Inc. v. Commonwealth of Penna., Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980). In *Ryan v. Commonwealth, Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1975) the DER required a former lessee of a landfill to enter the land he previously leased in order to correct the nuisances which he

created during the lease. 373 A.2d at 476. Ryan challenged the authority of the DER to make him comply with the order because he was not presently the owner or occupier of the land. *Id.* at 477. Despite Ryan's non-proprietary status, the court found that the DER had the "express, unconditional authority to protect the health of the citizens of this Commonwealth by ordering the abatement of nuisances." *Id.*

Moreover, the Clean Streams Law is a codification of the common law of nuisance relating to streams and waterways. *Com. ex rel Shumaker v. New York & Pennsylvania Co.*, 367 Pa. 40, 79 A.2d 439, 444 (1951).

> "It is a principle of the common law, that the erection of anything in the upper part of a stream of water, which poisons, corrupts or renders it offensive and unwholesome, is actionable. And that principle not only stands with reason, but is supported by unquestionable authority ancient and modern.

Howell v. McCay, 3 Rawle 256 (1832). Thus, there can be no question that if there are pollutants on property which are contaminating the waterways, an action can be brought against the property owner to abate the nuisance.

Hercules, however, takes the position that the controlling principles are those set forth in *Restatment (Second) of Torts* §352 amd 353 (1965).[9] I do not agree.

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9. §352. Dangerous Conditions Existing at Time Vendor Transfers Possession.

Except as stated in §353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artifical, which existed at the time that the vendee took possession.

§353. Undisclosed Dangerous Conditions Known to Vendor

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artifical , which involves unreasonable risk to persons on the land, is subject to

Section 352 sets forth the general rule of nonliability of a vendor or transferor of land for physical harm suffered by a vendee or others due to a dangerous condition which existed on the land at the time of transfer. Section 353 carves out a narrow exception whereby the vendor will be subject to liability if he fails to disclose or conceals any condition which involves an unreasonable risk of harm to persons on the land. Neither section is applicable since they address a vendor's liability for physical harm to persons on the land whereas the instant case involves a claim for the costs of abating a nuisance. Thus §840A provides the rule:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to to liability for the continuation of the nuisance after he transfers the land.

Restatement of Torts (Second) §840A.

Hercules urges the court to ignore this section because it has not been expressly adopted by the courts of Pennsylvania. But neither has it been rejected and as a

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NOTES (*Continued*)

liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

general matter, the Pennsylvania courts have "not hesitated to adopt sections of the [Restatement] when [their] common law precedents varied from the Restatement or when the Pennsylvania common-law provide[s] no answer." *Gilbert v. Korvette, Inc.*, 457 Pa. 602, 611-612, n.25, 327 A.2d 94, 100 n.25 (1975). (citing cases). There is no question in my mind that when and if the Supreme Court of Pennsylvania is presented with the opportunity it would accept §840A as a statement of the rule in Pennsylvania. This is implicit in *Ryan v. Commonwealth, Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1975); *National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980).

Moreover, my conclusion that Hercules can be held accountable for the abatement of the nuisance which its predecessor created is supported by analogous cases in other jurisdictions. *See State v. Ole Olsen, Ltd.*, 352 N.Y.S. 2d 97 (1973) (offensive sewage disposal units in a number of housing developments created a nuisance for which builder can be responsible); *City of Jackson, Mississippi v. Filtrol Corp.*, 624 F.2d 1384, 1390 (5th Cir. 1980) (court permitted an easement holder to recover damages in nuisance against the owner of the property who had contaminated its subsoil with sulfuric acid.)

I have no difficulty in predicting that if the Supreme Court of Pennsylvania had this case before it, it would impose liability on Hercules for the nuisance which its predecessor created at the Chester site.

III. THE INJUNCTION

The most substantial of Hercules' post-verdict claims is that the court erred in ordering mandatory relief. In response to special interrogatories the jury found

that PICCO caused the contamination of the property [10] and that the contamination continues to pollute the groundwater and the Delaware River.[11] Based on these findings I entered the following order:

> . . . IT IS FURTHER ORDERED AND DECREED that Hercules, Inc. shall forthwith take all appropriate action to abate and eliminate the contamination on the property of the Philadelphia Electric Company located at the Chester Site and abate the further pollution of the ground water and the Delaware River adjacent to the property by collecting and removing all pollutants in accordance with all applicable rules and regulations of the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, and any other appropriate state or federal regulatory agency; . . .

Hercules makes three arguments with respect to the injunction: first, that this court lacked the authority to award the injunction; second, that there was insufficient evidence to warrant mandatory relief; and last, that it was substantially prejudiced because it proceeded to trial on the basis that injunctive relief was not an issue.

PECO's complaint alleged that Hercules' predecessor, PICCO, created a continuing nuisance on the

---

10. The jury responded "yes" to special interrogatory #1 which asked

> "Do you find by a preponderance of the evidence that PICCO caused the contamination on the property now owned by Philadelphia Electric Company?

11. The jury responded "yes" to special interrogatory #2 which asked:

> "Do you find by a preponderence of the evidence that the contamination on the property now owned by Philadelphia Electric Compnay continues to pollute the ground water on the Delaware River."

Chester Site, *See* Paragraphs 8, 10, 17, 22 and 23 of Complaint, and it supported this claim by evidence showing as follows: PICCO, Hercules, predecessor was a resin manufacturing plant; during PICCO's operation of the Chester Site it dumped resins into a lagoon on the property to neutralize their acidic quality; a DER representative visited the Chester Site and found a resinous material in the lagoon and oozing from the banks of the property into the Delaware River; samples taken from the property turned out to be hydrocarbon resins which compared favorably to resins identified as PICCO materials; this hydrocarbon resinous material was in the groundwater under the property and leaching from the banks of the property into the Delaware River; and lastly, this material is presently oozing from the surface of the property.

Hercules offered evidence that Gould, not its predecessor PICCO, created the nuisance on the land but the jury, rejected this version of the facts and found in favor of PECO. There was ample evidence to support the jury's determination and I can find no basis upon which to overturn that finding.

The jury's determination that the contamination on the Chester Site continues to pollute the groundwater and the Delaware River is grounds for injunctive relief. It has long been the rule in Pennsylvania that once a continuing nuisance is established, an injunction is an appropriate remedy. *Krocker v. Westmoreland Mill Co.*, 274 Pa. 143, 117 A. 669 (1922); *Keppel v. Lehigh Coal and Navigation Co.*, 200 Pa. 649, 50 A. 302 (1901); *Steward v. Foltz's Appeal*, 56 Pa. 413 (1867); *Bradley v. Valicenti*, 185 Pa. Super. 403, 138 A.2d 238 (1958).

Hercules' bald assertion that it has been substantially prejudiced by the granting of an injunction finds little substance in the record.

The Complaint stated a claim for a continuing nuisance and in addition to damages, the prayer requested "such other and further relief as may be just." This was

clearly sufficient to put defendant on notice particularly in light of the fact that the only practical way to abate a continuing nuisance is by mandatory relief. Moreover, Fed. R.Civ.P. 54(c) provides, in part, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" (emphasis added). Also, it should be noted that plaintiff's pretrial memorandum filed eleven days before the commencement of trial specifically requested injunctive relief. Hercules neither objected nor moved to strike this demand.

Finally, if Hercules believed that relief from a continuing nuisance was not an issue in the case, it certainly would have objected to Interrogatory #2 (See Footnote 11, supra) as irrelevant and immaterial, but it did not. Hercules' argument that injunctive relief was not an issue because I denied PECO's motion on the eve of trial to amend that Complaint to assert a claim under the Clean Streams Law is without merit. That statute expressly provides that actions under the Clean Streams Law are not to be construed as the exclusive remedy for abating nuisances. Pa. Stat. Ann. tit. 35 § 691.701 (Purdon 1977).

Hercules' also maintains that the teaching of *United States v. 47 Bottles More or Less, Etc.*, 320 F. 2d 564 (3d Cir. 1963), precludes the granting of an injunction under the circumstances presented here. I do not agree.

47 Bottles involved a condemnation proceeding under the Federal Food, Drug and Cosmetic Act wherein the govenment was permitted to amend its complaint to add a prayer for injunctive relief at the conclusion of the trial. *Id.* at 567. In reversing the award of injunctive relief the court held that the trial judge abused his discretion in permitting the injection of a new and different prayer for relief at the terminal stage of the case after the evidence had been closed and the court had made its findings. *Id.* at 573.

Such is not the case here. Hercules had ample notice before trial of the plaintiff's demands. Significantly, the court in *47 Bottles* distinguished *United States v. 184 Barrels of Dried Whole Eggs*, 53 F. Supp. 652 (E.D. Wis. 1943) by pointing out that there the amendment requesting injunctive relief was made "at an early stage of the trial." 320 F.2d at 574.

Hercules' remaining contentions find no support in the record and therefore will not be discussed. Hercules' motion for judgment n.o.v. and/or in the alternative, for a new trial are therefore denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INCORPORATED	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

ORDER

AND NOW, this 22nd day of FEBRUARY, 1984, upon consideration of the Motion for Judgment Notwithstanding the Verdict and/or for a New Trial filed on behalf of Hercules, Incorporated, it is hereby

ORDERED that the motion be and the same is hereby DENIED

BY THE COURT:

JOSEPH L. McGLYNN, JR. *J.*

A-55

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1159

PHILADELPHIA ELECTRIC COMPANY

v.

HERCULES, INC.

and

GOULD, INC.,

Hercules, Inc., Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and McCUNE, *District Judge**

---

* Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

The petition for rehearing filed by Petitioner-Appellee, Philadelphia Electric Company, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____

Circuit Judge

Dated: June 21, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INC.	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

SPECIAL INTERROGATORIES

1. Do you find by a preponderence of the evidence that PICCO caused the contamination of the property now owned by Philadelphia Electric Company?

   Yes X No ____

   If your answer is no, do not answer any other questions. If your answer is yes, go on to the next question.

2. Do you find by a preponderance of the evidence that the contamination on the property now owned by Philadelphia Electric Company continues to pollute the groundwater or the Delaware River.

   Yes X No ____

3. In what amount do you award damages?

   $345,906.69

4. Do you find by a preponderance of the evidence that ABM's activities contributed to the contamination of the Philadelphia Electric Company property?

   Yes X No ____

5. Was Gould aware of ABM's activities and permitted them to continue?

Yes X No ____

6. If your answer is Yes, by what percentage did ABM's activities contribute to the total contamination?

Hercules	%
ABM	%
	100%

Supreme Court, U.S.
FILED
OCT 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-477 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

HERCULES INCORPORATED,
Respondent

and

GOULD, INC.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Third Circuit

BRIEF OF HERCULES INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John Gerald Gleeson, Esquire
Hercules Incorporated
Hercules Plaza
Wilmington, DE 19899
(302) 594-7004

Joseph G. Manta, Esquire
John C. Sullivan, Esquire
FRUMKIN & MANTA
Suite 1818
Three Penn Center Plaza
Philadelphia, PA 19102
(215) 988-0777
Attorneys for Respondent, Hercules Incorporated

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PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Will this Court consider on a petition for writ of certiorari an issue now claimed by petitioner to raise a federal question where petitioner argued in the court below that the identical issue was controlled by state law?

2. Will this Court grant certiorari in a diversity case where (1) no federal question is presented, where (2) the only issues presented arise under the common law of Pennsylvania, and where (3) federal and state standards are substantially identical?

3. Does this case present an issue sufficiently important to command review by this court in view of the facts that (1) the Third Circuit refused to give its ruling general application and expressly limited its decision to the unique facts before it, that (2) the passage of various environmental statutes makes this case unlikely to recur in the federal courts, and that (3) the Third Circuit's decision is consistent with applicable precedent?

LIST OF PARTIES

Hercules Incorporated accepts as accurate petitioner's list of parties. In compliance with Rule 28.1, Hercules attaches a list of Hercules' foreign and domestic subsidiaries and affiliates. *See* Resp. Appendix at A-1-2.

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No. 85-477

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

HERCULES INCORPORATED,
Respondent

and

GOULD, INC.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Third Circuit

BRIEF OF HERCULES INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Philadelphia Electric Company (hereinafter "PECO") filed this lawsuit against Respondent Hercules Incorporated (hereinafter "Hercules") and Gould, Inc. (hereinafter "Gould") for the costs of cleaning up certain materials leaching from industrial property owned by PECO into the Delaware River. PECO

claimed that the materials had been placed on the property by a former owner, Pennsylvania Industrial Chemical Corporation (hereinafter "PICCO"). PICCO had sold the property to Gould, which later sold the property to PECO. Hercules' liability was based on its status as an alleged successor to PICCO. Hercules had never owned the land in question or used the land for any purpose, but had purchased PICCO's remaining assets approximately two years after PICCO had sold the property. PECO's claims against Hercules were grounded in private and public nuisance and were limited to claims under the common law of the Commonwealth of Pennsylvania. The sole basis for federal jurisdiction was diversity of citizenship and an amount in controversy in excess of $10,000.00. *See* 28 U.S.C. §1332.

The case proceeded to a trial by jury. During that trial, PECO neither alleged nor introduced evidence that it used the Delaware River or that it was harmed by the alleged pollution of the River. (Pet. Appendix at A-25) Nonetheless, at the close of the evidence, the trial judge, over Hercules' objections, instructed the jury on principles of public and private nuisance. The jury returned a verdict in favor of PECO and against Hercules.

Hercules filed timely motions for judgment notwithstanding the verdict or for a new trial. After the district court denied Hercules' post-trial motions, Hercules appealed to the Third Circuit.

On appeal, the Third Circuit reversed the judgment against Hercules. The court held that PECO had no private nuisance cause of action against Hercules since the defect PECO complained about existed on PECO's own land. (Pet. Appendix at A-16-22) The Third Circuit held further that PECO had not stated a cause of action for public nusiance because it had not alleged or proved that it sustained harm while exercising a right common to the general public. (Pet. Appendix at A-22-25) Finally, the Third Circuit rejected, on two grounds, the indemnity claim which PECO had asserted for the first time in its

appellate brief. (Pet. Appendix at A-26) First, the court found that PECO had failed to prove that it was itself legally liable for the clean up of its property as required to recover indemnity under Pennsylvania law. (Pet. Appendix at A-27-29) Secondly, the court ruled that indemnity was not available where, as here, the liability of both parties was merely vicarious. (Pet. Appendix at A-29-30)

PECO filed a Petition for Rehearing in Banc with the Third Circuit. PECO claimed that the panel's decision was contrary to "controlling" Pennsylvania standing decisions. (Resp. Appendix at A-16) In fact, the heading of PECO's argument was:

> Under the Established Law of Public Nuisance in the Commonwealth of Pennsylvania, PECO Has the Requisite Standing to Maintain this Action Against Hercules.

(Resp. Appendix at A-6) PECO also argued that it was entitled to indemnification under Pennsylvania law. After its Petition for Rehearing was denied, PECO filed this petition for writ of certiorari. In this Court, however, PECO has changed its position on standing and now argues that the federal law of standing, rather than Pennsylvania's law, should control.

SUMMARY OF ARGUMENT

This diversity case does not present an issue which warrants review by this Court on certiorari. First, this case does not involve any federal question. Because this is a diversity case in which the law of Pennsylvania applies, the questions of whether PECO had stated a cause of action for public nuisance, whether it had standing to assert such a claim, and whether it was entitled to indemnification from Hercules are governed by the law of the Commonwealth of Pennsylvania. Although PECO now attempts to characterize the question of its standing

to assert a public nuisance as a federal question, it argued before the Third Circuit that Pennsylvania's law of standing applied. Moreover, contrary to PECO's present position, federal courts apply the state law of standing in diversity cases. Since the highest court of each state, and not this Court, is the ultimate arbiter of state law, a decision by this Court would have no binding effect either on similar state court lawsuits or similar federal court diversity lawsuits.

Secondly, this case is not of sufficient general importance to warrant review by this Court. PECO's only argument for the importance of this case is that a decision on standing does not bar relitigation. Under PECO's analysis, however, the danger of relitigation would be present with respect to any decision on standing. It does not make *this* case important. In addition, the Third Circuit's decision is narrow in scope. The Third Circuit expressly refused to give its ruling general application and limited its decision to the unique factual situation presented in this case. Moreover, the passage of various environmental statutes combined with the unique factual issues presented here make this case unlikely to recur.

Finally, PECO's claims for private nuisance[1] and public nuisance, as well as its last minute indemnification claim, were correctly rejected by the Third Circuit. The essence of a public nuisance is injury to the public. Because PECO failed to allege or prove that it had sustained an injury while exercising a right common to the public, the court determined that it had not stated a cause of action for public nuisance. PECO's indemnity claim was not included in its complaint and was not submitted to the jury; it was asserted as an afterthought in PECO's brief to the Third Circuit. The claim was rejected because PECO had not offered any evidence to

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1. Since PECO has not challenged the Third Circuit's ruling on private nuisance, Hercules will not discuss that aspect of the court's decision.

sustain an indemnification claim. More importantly, however, regardless of this failure of proof, indemnity was inapplicable as a matter of law since the liability of the parties was vicarious only. The Third Circuit's decision is fully consistent with the facts and with applicable precedent.

ARGUMENT

I. THIS CASE, IN WHICH THE SOLE BASIS FOR FEDERAL JURISDICTION WAS DIVERSITY OF CITIZENSHIP AND IN WHICH ONLY PENNSYLVANIA NUISANCE LAW ISSUES WERE INVOLVED, DOES NOT PRESENT A FEDERAL QUESTION.

The ultimate issues in this case, and the focus of the Third Circuit, was whether PECO had stated a cause of action under Pennsylvania law for public nuisance and/or indemnification. These issues do not involve any constitutional or federal statutory questions, but involve legal issues governed by the law of the Commonwealth of Pennsylvania. This Court does not review the considered determination of questions of state law by an intermediate federal appellate court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

PECO argues that certiorari should be granted on the ground that the Third Circuit's ruling was that PECO had no standing to sue in public nuisance and that this ruling contravened *federal* law. The latter part of this argument represents a dramatic shift in PECO's position. PECO itself recognized the inapplicability of the federal law of standing in its Petition for Rehearing In Banc to the Third Circuit. In fact, PECO argued in that petition that "the panel decision is contrary to the laws of the Commonwealth of Pennsylvania and to the decisions of the Supreme Court of Pennsylvania, *which law is controlling in this action*," on the standing issue.

(Resp. Appendix at A-16, emphasis added). PECO now attempts to shift positions in order to raise a federal issue for purposes of invoking this Court's discretionary jurisdiction. Such maneuvering does not create a basis for review on certiorari, however. This Court will not consider on a grant of certiorari bases for liability not argued below. *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). In this case, PECO attempts to go further than the petitioner in *Miree*. Here, PECO not only failed to argue that the federal law of standing applied, but argued the converse, that Pennsylvania law was controlling. This Court should not consider such an argument on a writ of certiorari.

Moreover, the Third Circuit's decision was actually grounded on PECO's failure to state a cause of action. The Third Circuit stated its holding as follows: "We hold only that in this case the purchaser of that land, PECO — though we recognize that it acted as a responsible corporate citizen — *had no cause of action* against the vendor's successor, Hercules, for private nuisance, public nuisance, or common law indemnity." (Pet. Appendix at A-31, emphasis added) As PECO itself acknowledges, under the *Erie* doctrine, "the requirements of a claim for public nuisance are state-law determinative." *See* PECO Petition at 8 n.3.

The Third Circuit did fully discuss the standing of PECO to bring a public nusiance claim. As illustrated by PECO's petition, however, the question of whether a private party has stated a cause of action in public nuisance is intertwined with the question of whether that party has standing. According, to PECO, in order to have standing, a plaintiff must have alleged some *particularized injury* that sets him apart from the man in the street; in order to have stated a cause of action, plaintiff must plead, and prove, a *particular damage*, different in kind and degree from that suffered by the general public. *See* PECO Petition at 18. No meaningful distinction can be drawn between these two inquiries.

Contrary to PECO's contention before this Court, the question of standing in diversity cases is a matter of state law, not federal law.[2] Federal concepts of standing developed to regulate enforcement of federal rights do not represent any independent interest of the federal courts that justifies disregarding state law in the diversity context. 13A C. Wright, A Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.14, at 84 (1984). This rule has long been recognized by this Court and other federal courts. For example, in *Williams v. Mayor of Baltimore*, 289 U.S. 36, 48 (1933), this Court ruled that state law determines who has standing to challenge the constitutionality of a state statute on the ground that it violates a state constitution.

This principle has been reaffirmed in recent decisions of the intermediate federal appellate courts. For example, in *Beckman Cotton Co. v. First National Bank*, 666 F.2d 181, 183 (5th Cir. 1982), the court applied Georgia law to determine plaintiff's standing to sue in a diversity case. *See also City of Moore v. Atchison, Topeka, & Santa Fe Railway Co.*, 699 F.2d 507, 511 (10th Cir. 1983) (in a diversity suit, state law determines standing of city to challenge state statute exempting railroads from city zoning power); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 747-48 & n.8 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) (state law of standing applied to claims that city's zoning actions violated state law); *Wamp v. Chattanooga Housing Authority*, 527 F.2d 595 (6th Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) (since plaintiff did not have standing to maintain action in state court, federal court had no removal jurisdiction).

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2. PECO does not even attempt to characterize the issue of whether it was entitled to indemnification as a federal question. The indemnification issue is unquestionably a matter of state law.

In fact, the very commentator cited by PECO on the question of the applicable law for standing determinations rejects petitioner's argument. In discussing the effect of state law on standing in federal diversity cases, Wright says: "[A]s to litigation involving state rights but commenced in federal courts or removed to them, state law [of standing] ordinarily should apply." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.14, at 84 (1984). The cases cited by PECO stand for the proposition that the federal law of standing applies only when a plaintiff is asserting federal rights. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 n.8 (1976) (state law of standing does not govern where plaintiff is seeking relief in federal courts for an asserted injury to its federal rights). Since PECO asserted no federal rights, the federal law of standing has no applicability.

Whether the federal or Pennsylvania law of standing is applied, the test is substantially the same: (1) whether plaintiff alleges that the challenged activity has caused him injury in fact and (2) whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 153 (1970); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 283-84 (1975). Standing rulings are not made in a vacuum, but require consideration of the "specific circumstances of the individual circumstances." *See United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953). The Third Circuit found that PECO had never alleged or proved that it had sustained a "particular injury" while exercising a right common to the general public as required under applicable public nusiance principles. (Pet. Appendix at A-25) Therefore, PECO could not meet either federal or Pennsylvania standing requirements.

In a diversity case, the lower federal courts and this Court are bound to follow applicable state law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). "Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties." *Peterson v. U-Haul Co.,* 409 F.2d 1174, 1177 (8th Cir. 1969). As a result, this Court's interpretation or application of state law will not prevent a different resolution of this issue by the state courts. *See, e.g., Brady v. Maryland,* 373 U.S. 83, 90 (1963); *Commonwealth v. Geschwendt,* 500 Pa. 120, 128, 454 A.2d 991, 995 (1982). Only issues of state law were presented in this diversity suit. Therefore, the petition for writ of certiorari should be denied.

II. THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW SINCE THE THIRD CIRCUIT'S DECISION WAS NARROW IN SCOPE AND INVOLVED ISSUES UNLIKELY TO RECUR IN THE FEDERAL COURTS.

Rule 17 of the Rules of the Supreme Court of the United States provides that this Court will grant review on a writ of certiorari "only when there are special and important reasons therefore." PECO has not made any showing that this case is of sufficient general importance to warrant review by this Court.

The only argument made by PECO to show the alleged importance of this case is its claim that a decision on standing does not preclude further litigation of the dispute by the parties. *See* PECO Petition at 14-17. As stated above, the holding of the Third Circuit was that PECO had not stated a cause of action for public nuisance. Therefore, this argument is immaterial.

Furthermore, even if the Third Circuit's decision is viewed as a standing decision, the argument that relitigation may result does not demonstrate the importance of this case. According to PECO, a ruling that any

plaintiff lacked standing would not bar a later suit based upon the same factual allegations.[3] Therefore, under PECO's analysis, the danger of relitigation argument could be made with respect to virtually any standing determination. PECO's argument proves too much. Surely it was not intended that this court would grant review on certiorari in any case which was dismissed for lack of standing.

In addition, it must again be noted that petitioner did not raise the danger of relitigation issue in its Petition for Rehearing In Banc to the Third Circuit. (Resp. Appendix at A-6-10) Petitioner should have raised this issue below when it had the opportunity.

That this case is lacking in the importance required for this Court to exercise its discretionary jurisdiction is further demonstrated by the limited nature of the Third Circuit's ruling. The decision, contrary to PECO's exaggerated view of its impact, *See* PECO Petition at 6, says nothing about the rights of purchasers and sellers of real estate generally. To the contrary, the Third Circuit was careful to expressly limit its decision to a determination that, based on the evidence presented in this case, PECO had no cause of action under Pennsylvania law against Hercules for private nuisance, public nuisance or common law indemnity. (Pet. Appendix at A-31)

Finally, the issue in this case is unlikely to recur in the federal courts. The federal common law of nuisance

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3. Contrary to PECO's claim, PECO would be barred from further litigation in this case. First, the Third Circuit's actual holding was that PECO had not stated a cause of action. Dismissal for failure to state a proper cause of action is a judgment on the merits. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 399 n.3 (1981); *Bell v. Hood,* 327 U.S. 678, 682 (1946). Moreover, *McCarney v. Ford Motor Co.,* 657 F.2d 230, 231 (8th Cir. 1981), which PECO cites as support, is inapplicable. In *McCarney,* the court addressed only the "narrow issue of whether a dismissal for lack of standing *to invoke a particular statute* can act as a bar to a later suit based upon the same factual allegations." (Emphasis added) It has no applicability to a case based on various common law theories.

has been preempted by the various federal environmental statutes. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 22 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Third Circuit recognized that an extension of common law nuisance would be inadvisable since "Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities." *See* Pet. Appendix at A-22. Therefore, the issues presented here would arise only in those diversity cases where a purchaser of land sought recovery in nuisance from the seller of that land for an alleged defect existing in the property. Such claims will be limited in number.

This Court grants review on certiorari only to resolve issues of general importance as distinguished from cases only of importance to the parties. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950). The only real questions PECO raises in its Petition turn on the particular facts of this case alone and are of interest only to the parties to it. Given the limited scope of the Third Circuit's decision and the improbability of recurring litigation of this nature, this case does not merit review by this Court on certiorari.

III. PECO'S CLAIMS WERE PROPERLY REJECTED BY THE THIRD CIRCUIT.

A final reason for denying the PECO petition is that each claim for which it seeks review was correctly rejected by the Third Circuit.

A. *PECO Did Not State Or Prove A Public Nuisance Claim Since It Did Not Allege That It Sustained Harm While Exercising A Right Common To The General Public.*

The essence of PECO's public nuisance claim was that its land was damaged by the presence of contaminants which were leaching from its land into the Delaware River. By way of contrast, the essence of a public nuisance is injury to the public. *Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.*, 428 Pa. 350, 237 A.2d 342, 348 (1968). As a result, in order for a private plaintiff to recover damages for a public nuisance, it must have "suffered harm of a kind different from that suffered by other members of the public *exercising the right common to the general public* that was the subject of interference." Restatement (Second) of Torts §821C (1979) (emphasis added). PECO never alleged or attempted to show that it was making any use of the Delaware River or that it was harmed in any way by the alleged contamination of those waters. Instead PECO focused on the condition of its own property.

The Third Circuit, consistent with applicable precedent, found that PECO had not made out a claim for public nuisance because it found that PECO had made no allegation nor offered any evidence that it had sustained any harm while exercising a right common to the general public. (Pet. Appendix at A-24-25) This limit on private actions for public nuisance has been recognized by the courts, the Restatement and the leading commentator on tort law. *See, e.g., O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 658 (E.D. Pa. 1981) (public nuisance claim brought by private individuals dismissed where plaintiffs proved only that contaminants were entering a creek, but failed to show harm to users of the creek caused by the leachate discharges); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), *aff'd*, 559

F.2d 1200 (1st Cir. 1977) (public nuisance claims brought by businessmen who alleged economic harm from pollution of a lake dismissed where plaintiffs did not assert any interference with their exercise of a public right); Restatement (Second) of Torts §821C (1979) (in order to recover damages in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference); W. Prosser, *The Law of Torts*, §88, at 586 (4th ed. 1971) (private individual has no action for invasion of public right unless he is injured by public nuisance over and above the injury suffered by public generally).

Furthermore, the Third Circuit properly distinguished the facts of this case from public nuisance claims by riparian landowners whose property was damaged by pollution. (Pet. Appendix at A-25) In each of those cases, the damage to the property was *caused* by the pollution of the river; here it is alleged that PECO's property was the *source* of the pollution of the Delaware River. This case presents the inverse of a public nuisance.

B. *PECO's Eleventh-Hour Attempt To Assert A Cause Of Action For Indemnification Was Properly Rejected By The Third Circuit Because PECO Failed To Prove That It Was Legally Liable For The Cleanup Of The Site And Because There Can Be No Common Law Indemnification As Between Parties Whose Liability Is Merely Vicarious.*

In its Brief to the Third Circuit, PECO argued for the first time that it was entitled to recovery on common law principles of indemnification. The Third Circuit properly rejected this claim finding: (1) that the record did not support affirmance on the basis of a cause of action never pleaded, proved, nor submitted to the jury and (2) that

there could be no common law indemnification between two parties whose liability is merely vicarious. (Pet. Appendix at A-25-31) The Third Circuit's decision is consistent with applicable Pennsylvania law.

The initial problem with PECO's indemnification claim was that the evidence submitted by PECO did not support it. This is not surprising since PECO had never pleaded, proved nor submitted the indemnification issue to the jury. (Pet. Appendix at A-26) In fact, the issue was first raised by PECO in its appellate brief. Under Pennsylvania law, PECO was required, *inter alia*, to prove that it was legally liable for the cleanup of the PECO site in order to recover indemnity. *Tugboat Indian Co. v. A/S Ivarans Rederi*, 334 Pa. 15, 21, 5 A.2d 153, 156 (1939). Finding no such evidence, the Third Circuit properly rejected PECO's claim. PECO ignores this fundamental failure of proof in its petition to this Court.

The Third Circuit also found that as a matter of law there could be no indemnity between two parties whose liability is vicarious. In this case, PECO's liability was based on its status as successor to PICCO in title to the land; Hercules' alleged liability was based on its status as successor to PICCO's other assets. The Third Circuit's decision was based on the general rule that indemnity turns upon whether the difference in the gravity of the faults of the participants is so great as to throw the whole loss upon one. (Pet. Appendix at A-30) Once again this ruling is fully consistent with applicable precedent which holds that there can be no indemnification between two parties whose liability is vicarious. *See Liberty Mutual Insurance Co. v. Curtis Noll Corp.*, 112 Mich. App. 182, 315 N.W.2d 890 (1982).

The Third Circuit gave full consideration to the issues and decided them correctly and fairly. The Third Circuit's reasoning and conclusions showed a scholarly attempt to ascertain what the Pennsylvania courts would have done in an area described by Prosser as an "impenetrable jungle." W. Prosser, *Handbook of the Law of*

Torts §86, at 571 (4th ed. 1971). The case was fully consistent with relevant Pennsylvania precedent. As a result, the decision was entirely in accordance with the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing reasons, Respondent Hercules Incorporated respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

By_____
John Gerald Gleeson
Hercules Incorporated
Hercules Plaza
Wilmington, DE 19894
(302) 594-7004

FRUMKIN & MANTA

By_____
Joseph G. Manta
John C. Sullivan
Suite 1818
Three Penn Center Plaza
Philadelphia, PA 19102
(215) 988-0777

Attorneys for Respondent Hercules Incorporated

APPENDIX TO HERCULES INCORPORATED'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HERCULES' SUBSIDIARIES AND AFFILIATED COMPANIES

Consolidated, Wholly Owned Subsidiaries
(Directly or Indirectly)

AUSTRIA
Patex Chemie GmbH, Traun

THE BAHAMAS
Hercules International Trade Corporation Limited (HINTCO), Nassau

BELGIUM
Hercules Chemicals N.V., Beringen

BRAZIL
Hercules do Brasil Produtos Quimicos Ltda., Sao Paulo

CANADA
Hercules Canada Inc., Mississauga, Ontario

DENMARK
A/S Kobenhavns Pektinfabrik, Lille Skensved

ENGLAND
Hercules Limited, London
The Holden Vale Manufacturing Company, Limited, Haslingden
PFW Ltd., Perivale

FINLAND
Oy Hercofinn Ab, Helsinki

FRANCE
Hercules France S.A., Paris

GERMANY
Hercules GmbH, Hamburg
Pomosin AG, Grossenbrode

HONG KONG
Hercochem (H.K.) Ltd.

ITALY
Hercules Bewoid Italia S.p.A., Milan
Cesalpinia S.p.A., Milan

JAPAN
Hercules Far East K.K., Tokyo

MEXICO
Quimica Hercules, S.A. de C.V., Mexico, D.F.

THE NETHERLANDS
Hercules B.V., Rijswijk
PFW (Nederland) B.V., Amersfoort

SINGAPORE
Hersean Pte Ltd., Singapore

SPAIN
Ceratonia, Sociedad Anonima, Tarragona
Rohe, S.A., Tarragona

SWEDEN
Hercules Kemiska Aktiebolag, Goteborg

UNITED STATES
Caribbean Lumber Company, Inc., Savannah, Georgia
Champlain Cable Corporation, Wilmington, Delaware
Esgraph Incorporated, Cerritos, California
Hercules Chemical Corporation, Wilmington, Delaware
Hercules Overseas Corporation, Wilmington, Delaware
Hercules Trading Corporation, Wilmington, Delaware
Simmonds Precision Products, Inc., Tarrytown, New York

Consolidated, Joint-Venture Companies
(Percent Directly Owned)

UNITED STATES
Hercofina, Wilmington, North Carolina (74%)
Hercofina (Delaware), Wilmington, Delaware (74%)
Lextar, Wilmington, Delaware (100%)

Affiliated Companies
(Percent Directly or Indirectly Owned by Hercules)

AUSTRALIA
Australian Chemical Holdings Limited, Botany, New South Wales (60%);
Hercules Chemicals Australia Pty. Ltd., Melbourne (60%);
Spurway Cooke Holdings Limited, Sidney (36%)

BELGIUM
HIMONT Belgium N.V., Beringen (50%)

BERMUDA
Curtis Bay Insurance Co. Ltd., Hamilton (100%)

BRAZIL
Companhia Brasileira de Produtos Quimicos Bononia, Sao Paulo (40%);
Polo Filme Industria e Comercio, Ltda., Sao Paulo (49%);
PPH — Companhia Industrial de Polipropileno, Porto Alegre (38%)

CANADA
HIMONT Canada Inc., Mississauga, Ontario (50%)

ENGLAND
Nelsons Acetate Limited, Lancaster (50%)

GERMANY
Abieta Chemie GmbH, Augsburg (50%)

INDIA
Herdillia Chemicals Limited, Bombay (22%);
Indian Gum Industries Limited, Bombay (49%)

ITALY
HIMONT Italia S.p.A., Milan (50%);
Neofil S.p.A., Milan (50%)

JAPAN
DIC-Hercules Chemicals Incorporated, Tokyo (50%);
Japan Magnetics, Ltd., Tokyo (50%);
Rika-Hercules Incorporated, Osaka (50%);
Sumika-Hercules Company, Ltd., Osaka (50%);
Teijin Hercules Chemical Company Limited, Tokyo (49%)

MEXICO
Petrocel, S.A., Tampico (30%);
Taloquimia, S.A., Chihuahua (49%)

THE NETHERLANDS ANTILLES
Erbamont, N.V. (13%);
Finance Company of Hercules, Inc. N.V. (100%)

NEW ZEALAND
A. C. Hatrick (N.Z.) Ltd., Auckland (60%)

PAKISTAN
Dawood Hercules Chemicals Limited, Lahore (40%);
Pakistan Gum Industries Limited, Karachi (49%)

TAIWAN
Taiwan Hercules Chemicals Inc., Taipei (67%);
Taiwan Polypropylene Company Limited, Taipei (40%)

UNITED STATES
Hercules Credit, Inc., Wilmington, Delaware (100%);
HIMONT Incorporated, Wilmington, Delaware (50%);
HIMONT U.S.A., Inc., Wilmington, Delaware (50%);
Texas Alkyls, Inc., Deer Park, Texas (50%)

VIRGIN ISLANDS
St. Croix Petrochemical Corp., St. Croix (37%)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA ELECTRIC COMPANY	:	
Appellee	:	
v.	:	Appeal No. 84-1159
HERCULES INCORPORATED,	:	
and	:	
GOULD, INC.,	:	
Hercules, Inc., Appellant	:	

APPELLEE PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR REHEARING IN BANC PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE NO. 40

JOSEPH M. DONLEY, ESQ.
Kittredge, Kaufman & Donley
121 South Broad Street, 8th Flr.
Philadelphia, PA 19103
(215) 732-2700

PETITION OF PHILADELPHIA ELECTRIC COMPANY FOR REHEARING BEFORE THE COURT IN BANC

Petitioner-Appellee, Philadelphia Electric Company ("PECO"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully requests this Honorable Court to grant it a rehearing in banc of the appeal in the above-captioned action, in which a panel of this Court ("the Panel") vacated the injunction and reversed the judgment entered by the district court, which was based upon a jury verdict in favor of PECO and against Defendant Appellant Hercules, Inc. ("Hercules").

The Panel by its judgment and opinion of May 28, 1985, has upset a jury verdict, which found that Hercules through its predecessor in interest ("PICCO") had created a public nuisance on land now owned by PECO, and was responsible to PECO for the cost of the clean-up and to further abate the nuisance. The nuisance consisted of deposits of resinous materials and other contaminants, some of which are known or suspected carcinogens, which have polluted and continue to pollute and damage PECO's property, the groundwater on and under PECO's property and the Delaware River. The evidence produced at trial virtually fingerprinted the contaminants as being products produced by Hercules' predecessor, PICCO. Both the trial court and the Panel agreed that Hercules had expressly assumed PICCO's liability for the nuisance PICCO created at the Chester site.[1] The jury specifically found in answer to special interrogatories that a nuisance was created and that Hercules had created it, that it continues to pollute

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1. Since both the trial court and the Panel found that a de facto merger had occurred between PICCO and Hercules and that Hercules had expressly assumed PICCO's liability for the pollution of the Chester site, PECO will simply refer to PICCO as Hercules. (Slip Opinion pp. 8-16) Philadelphia Electric Company v. Hercules, Inc. and Gould, Inc., No. 84-1159, slip. op. at 8-16 (3d Cir. May 28, 1985) (hereinafter cited to as "Slip Op. at ").

PECO's property, PECO's groundwater and the Delaware River. There is no question that PECO had nothing to do with the creation of the nuisance and that PECO expended $345,906.69 in a reasonable attempt to curtail the pollution of the groundwater and the Delaware. Yet, the Panel in overturning the jury's verdict found in essence that PECO had no "standing" to assert any claims against Hercules.

PECO requests this rehearing on the grounds that this matter: (1) involves questions of exceptional importance; (2) concerns a matter of first impression both in this Circuit, and, to the knowledge of PECO, one which has never been specifically addressed by any other court in the United States; (3) concerns critical issues of economic, environmental and social circumstances; and because the Panel's opinion: (4) creates a dangerous precedent which unduly restricts and emasculates the doctrines of private and public nuisance and indemnification, which are recognized as necessary to remedy serious environmental hazards, contrary to existing principles of Pennsylvania law[2]; (5) is self-contradictory in its finding that Hercules expressly assumed the liability of PICCO for the pollution of the site and the nuisance created thereby, but that Hercules is not responsible to PECO for indemnification or nuisance which PICCO would have been; and (6) frustrates and undermines the constitutional rights guaranteed by the Commonwealth of Pennsylvania to ensure every person the right to clean air, pure water and the preservation of

2. Nor did the Panel even address the series of cases which recognize the "environmental tort" as the nuisance par excellance of the modern world. See, e.g., *New Jersey Department of Transportation v. PSC Resources, Inc.* 175 N.J. Super 447, 419 A.2d 1151 (1980); *New Jersey Department of Environmental Protection v. Ventron Corporation*, 94 N]J] 254, 463 A.2d 893 (1983); *New Jersey Department of Environmental Protection v. Exxon Corporation*, 151 N.J. Super 464, 376 A.2d 1339 (1997); *New York v. Ole Olsen, Ltd.*, 76 Misc. 2d 796, 352 N.Y.S. 2d 97 (1973) aff'd 357 N.Y.S. 2d 1016 (1974).

the natural environment. As set forth herein, the rehearing of this matter by the Court in banc is most important to correct an erroneous application of Pennsyylvania law to the circumstances of this case, which although is one of first impression, will become a vital area of the law in addressing problems of hazardous waste disposal, protection of the natural environment and placing the responsibility upon those who cause environmental and health threats by their operating and disposal practices.

A. Under the Established Law of Public Nuisance in the Commonwealth of Pennsylvania, PECO Has the Requisite Standing to Maintain this Action Against Hercules[3]

The Panel of this Court by its decision of May 28, 1985, has shifted the responsibility of the public nuisance from the party who created it to the one most damaged by it. As the Panel and the trial court aptly recognized, Hercules stands in the shoes of PICCO under concepts of de facto merger and as a result of its express assumption of PICCO's liabilities. (Slip Op. at 9-16) Accordingly, the Panel's attempt to paint Hercules as being innocent and without knowledge as to the creation of the nuisance is both irrelevant and inaccurate; PICCO is now Hercules; Hercules is now PICCO. The legal fiction of the "corporate entity" requires acceptance of this principal without qualification as to Hercules personal "fault". As the Panel stated: "We conclude that Hercules has assumed any liability PICCO may have had due to pollution of the Chester site." (Slip Op. at 11)

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3. While PECO also disagrees with the Panel's unduly conservative analysis of PECO's private nuisance claim and believes the Pennsylvania Supreme Court would reach a contrary result, PECO believes that it is unnecessary to reach that more difficult decision in order to prevail on its claims against Hercules, and therefore, will not address them herein.

But regardless of whether this Court characterizes Hercules as being blameless, Hercules is legally liable for abating the nuisance created by PICCO and it should not be permitted to side-step this responsibility by a finding, (on an issue raised for the first time before this Court) which requires a tortiously restrictive analysis of the "standing" requirement.[4]

The general rule, of course, has been that a private individual has no standing to sue for the abatement of a public nuisance if his injury is only that which is shared by the public generally. See, *Holloway v. Bristol-Myers Corporation*, 327 F. Supp. 17 (D.C.C. 1971), *aff'd*, 485 F.2d 986 (1973); W. Prosser, Law of Torts 188, at 583 (4th ed. 1971). This rule developed in the early common law because harm to the public order, decency or morals was considered a crime against the king. *See* Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966). Only the king, therefore, could bring an action against the perpetrator of the nuisance. The sole exception to this rule was that a member of the public had standing to sue if he suffered a special injury, which was different in kind from the general public. *See, e.g., Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156 (19th Cir. 1974), *cert denied* 419 U.S. 1033 (1974). The purpose of the rule was to prevent a multiplicity of actions and frivolous suits. Neither of these concerns could even arguably be considered to be a factor in denying PECO standing in the case.

As for whether PECO satisfies the requirements of the Restatement (Second) of Torts §821C (1977), which the Panel found applicable, the pleadings, PECO's pretrial memorandum, the evidence presented at trial and the specific findings of the jury all belie the Panel's conclusion that PECO did not allege or suffer any injury in

4. PECO submits that the Pennsylvania Supreme Court would adopt the more liberal standing requirement expressed by the Hawaii Supreme Court in *Akau v. Olomana Corp.*, 65 Hawaii 383 (1982), than that applied by the Panel in this case.

the exercise of a right common to the general public that was the subject of the interference. (Slip Op. at 24-25. The Panel states that: "If PECO — as a riparian landowner — had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance. But the condition of the Chester site was not the *result* of the pollution, it was the *cause* of it." (Slip Op. at 25) (emphasis in original). It is obvious from this statement that the Panel failed to focus upon a very key element of the case and the evidence presented at trial: It was the *pollutants* (i.e., PICCO resinous materials) *which were the cause of the contaminated condition of the Chester site, including PECO's soil and groundwater, and the contamination* of the *Delware River*. Thus, the public water both in the Delaware and the groundwater flowing on PECO's land was and continues to be contaminated by the nuisance Hercules created.

The groundwater and the Delaware River are natural resources belonging to the citizens of Pennsylvania and entrusted to DER. As the result of the contamination of these resources by Hercules, the public at large was and continues to be harmed. As owner of the property temporarily responsible for these natural resources, PECO was specifically harmed by both the damages to its property and the contamination of its groundwater and by DER's request to abate the polluting condition. *See, National Wood Preservers, Inc. v. Commonwealth Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980). That abatement, as of the time of trial, cost PECO $345,906.690. That expense is, indeed, harm of a kind different from and greater in degree than that suffered by other members of the public, in the exercise of a right common to the general public.

PECO pleaded and proved that as a result of the offensive nuisance created by Hercules, *not only* was the Delaware River being polluted but so was PECO's soil and groundwater. (J.A. 319-20; 341; 351-60; 430-31;

437-38; 469-84; 603-15; 644-48). Not only did PECO demonstrate that the soil and groundwater were being contaminated by the nuisance, but also that it was injured in the use and enjoyment of its property by the loss of rentals from its tenant as a result of the same pollutant which were contaminating the Delaware River. (J.A. 267-272)

The right to reasonable groundwater use and enjoyment is a right which all landowners possess and is also considered a public right. Restatement (Second) of Torts §821C comment (h) (1977); Pennsylvania Clean Stream Law, 35 P.S. §§691.1, 691.4. The case law is supportive of PECO's position that it has suffered special damages qualifying it as having the requisite standing. See, e.g., *Akau v. Olomana Corproation*, 65 Hawaii 383 (1921); *Heinl v. Pecher*, 330 Pa. 232, 198 A. 797 (1938); *Frady v. Portland General Electric Co.*, 637 P.2d 1345 (Or. App. 1981).

In *Heinl v. Pecher*, 330 Pa. 232, 198 A. 797 (1938), defendant erected an incinerator plant intended for the burning and disposal of garbage. The residents living adjacent to the plant brought an action for public nuisance to restrain defendants from operating the plant on the grounds that the defendants had not obtained a building permit and non-compliance with the applicable zoning statute was declared to be a nuisance. The Court affirmed the lower court's holding, "[s]ince plaintiffs alleged that the building was erected as an incinerator plant in violation of the ordinances of the township and since the building ordinance provides that a building erected in violation of its provisions shall be 'declared a nuisance' and 'may be abated' . . ." and the allegations were sustained by the evidence. *Id.* at 236, 918 A. at 799.

In *Heinl*, Defendants argued that plaintiffs had no right to bring the action for public wrongs. In response, the Court pointed out that since the violation of the ordinance was declared to be a nuisance, the private individual does have a right to bring the action as long as the

plaintiff's injury complained of is "only greater in degree" than that of the public. *Id.* at 238, 198 A. at 799. Also, defendants argued, on appeal, that plaintiffs showed only that the neighborhood would be depreciated and that was not sufficient damage to support a claim for public nuisance. The Supreme Court dismissed this argument on the ground that:

> 'Equitable relief must be predicated on an injurious invasion of a fixed and determined property right. By injury is meant something affecting the capacity of the property for ordinary use or causing a discomfort in the enjoyment of it that threatens the health or welfare of the occupant, with resultant injury to the property . . .'

Id. at 239, 198 A. at 800 (quoting *Pennsylvania Co. v. Sun Co.*, 290 Pa. 404, 138 A. 909)

As several of the plaintiffs lived adjacent to the incinerator plant, the Court held that, by operation of the plant, they would suffer "discomfort in the enjoyment" of their property.[5] *Id.* at 239, 198 A. at 800 (citation omitted).

It is difficult to fathom how, if this Court is applying Pennsylvania law, it can conclude that PECO did not suffer the requisite injury to give it standing in light of the Supereme Court's opinion in *Heinl*. For as recognized by Dean Prossser: "When a public nusiance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it *never* has been disputed that there is a particular kind of damage, for which the private action will lie." Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1018 (1966) (footnote omitted) (emphasis added).

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5. Although as of the time of the action, the incineration had never been in operation.

B. *As a Matter of the Law of the Commonwealth of Pennsylvania, PECO is Entitled to Indemnification From Hercules*

Contrary to the Panel's determination, the record clearly supports the conclusion that PECO "could have been compelled" through legal action taken by DER pursuant to the Clean Streams Law to incur the abatement expenses for the nuisance created by Hercules. Section 691.316 of the Clean Streams Law specifically provides in pertinent part:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

The Pennsylvania Supreme Court has upheld this provision as constitutional in *National Wood Preserves, Inc. v. Commonwealth Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980).

Under the Pennsylvania Clean Stream Law, "pollution" is defined as "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance . . ." §691.1. The jury specifically found that Hercules had created a nuisance which was polluting or contaminating the Delaware River and PECO's groundwater.[6] (J.A. 796-801) There was nothing further to sub-

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6. Section 691.1 also defines "Waters of the Commonwealth" as: ". . . any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds,

mit to the jury on the issue of indemnification. It is simply a matter of applying Pennsylvania law to the findings of the jury; the reasonableness and amount of the clean-up costs were conceded by Hercules' counsel. (J.A. 206).

Under federal practice it is not necessary to plead "causes of action", but merely to state a claim for relief. That PECO clearly did throughout and there cannt be any claim of "surprise" by Hercules[7] as to the fact that PECO was seeking recovery of its clean-up costs.

The Panel then tries to justify not shifting the responsibility to Hercules where it properly lies on the basis that Hercules was not the culprit , rather it was PICCO. (Slip Op. at 30) But such an "equitable" analysis contradicts the Panel's holding that Hercules is PICCO by virtue of the de facto merger doctrine and the Panel's holding that: ". . . Hercules has [expressly] assumed any liability PICCO may have had due to the pollution of the Chester site." (Slip Op. at 11) Surely PICCO (ergo Hercules) "was best suited to prevent the pollution". (Slip Op. at 30) Is there any question but that PICCO, if it had not been merged into Hercules, would have had to

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NOTES *(Continued)*

springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."

7. Indeed Hercules' entire defense of this case until the time of appeal was that it was not liable to PECO because it was not PICCO's successor in interest and had not assumed this obligation. Hercules took virtually no discovery, it filed no interrogatories or requests for production of documents. It did not view the site although PECO offered it the opportunity. Hercules' counsel stated in his opening; ". . . so that if you find the condition [PECO] alleges is the fault of PICCO, then your verdict will be against Hercules." (J.A. 205) During the course of the trial PECO submitted expert evidence which virtually "fingerprinted" the pollutants as PICCO products which were contaminating PECO's groundwater and the Delaware River. (J.A. 473-84; 645-48) Hercules offered no contrary expert opinion evidence.

answer to PECO in both public nuisance and indemnification? The Panel seemed to be swayed by the "fairness" of making PECO bear the responsibility because ". . . PECO had an opportunity to protect itself through inspection and negotiation. . ." (Slip Op. at 30) But even if that consideration had *any* bearing on the issues before this Court, it ignores the reality of the case and the evidence. PECO asserted, and evidence so established, that the buried contaminants were a latent condition undiscovered until years later. (J.A. 10, 257) Indeed, Hercules' defense proffered through former PICCO employees was that PICCO had not deposited the pollutants of which PECO and DER complained. (J.A. 520-22; 528-539) It is difficult to understand why the Panel believes it is fairer to shift the burden for this nuisance to PECO, who certainly had nothing to do with its creation, rather than to the party who created it yet to this day denies it. How was PECO to negotiate a "fair price" for land saddled with a latent condition which is a public nuisance, when the perpetrator of the nuisance to this day denies it and that party was not even PECO's seller.[8] Even if this Court somehow concludes that PECO and Hercules are on 'equal footing' with regard to the Chester site, shouldn't the principles of contribution apply? *See, e.g., State v. City of San Francisco,* 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979).

But once the court determined that Hercules assumed the liability for the Chester site, it acknowledged that Hercules is primarily liable and it, not PECO, should bear the burden of abatement. Despite disclaimers to the contrary, the Panel's self-contradictory opinion does stand for the proposition that ". . . a party that contaminates land, . . . can escape liability by the expedient of selling the land". (Slip Op. at 31)

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8. Nor was there any evidence that Gould knew of the existence of the pollutants which caused the public nuisance. The only evidence was that the condition which was caused by the resinous pollutants was a latent condition.

SUMMARY

The decision of the Panel in this case is contrary to the law of public nuisance as established in Pennsylvania, since PECO obviously has standing in that the pollutants which cause the nuisance have damaged PECO's property, interfered with PECO's use and enjoyment of its property, and polluted the groundwater on its property which then flows into the Delaware. PECO was, and continues to be, specially harmed in the exercise of its right to pure groundwater and uncontaminated soil, a right common to the general public, but which the Pennsylvania Clean Streams Law imposes an added obligation on a landowner to protect under Section 691.316. The monies PECO expended in abating the nuisance were in furtherance of these common rights and that attendant obligation. Moreover, PECO submits that the Supreme Court of Pennsyvlania would not apply such a restrictive standard for standing given its decision in *Heinl v. Pecher*, supra.

PECO further admits that the Panel's decision is self-contradictory in its analysis of PECO's right to indemnification in light of its holding that Hercules has expressly assumed the liability PICCO had for the pollution of the Chester site. Thus, the Panel's consideration of when Hercules acquired PICCO was inappropriate. PECO proved each and every element necessary to entitle it to indemnification from Hercules.

If the Panel's decision is permitted to stand, it will establish a precedent contrary to the law and public policy of Pennsylvania in requiring the one who caused the nuisance to correct it, and will haunt for years to come the development of the law of public and private nuisance in the area of environmental protection and hazardous waste disposal. Accordingly, PECO respectfully requests that its Petition for Reargument be granted.

Respectfully submitted,

KITTREDGE, KAUFMAN
& DONLEY

Joseph M. Donley
Robert Emmet Hernan
121 South Broad Street
8th Floor
Philadelphia, PA 19107
(215) 732-2700

Attorneys for Petitioner
Philadelphia Electric Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA ELECTRIC COMPANY	:	
Appellee	:	
v.	:	Appeal No. 84: 1159
HERCULES INCORPORATED,	:	
Appellant	:	
and	:	
GOULD, INC.,	:	
Appellee	:	

STATEMENT OF COUNSEL PURSUANT TO RULE 22 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the laws of the Commonwealth of Pennsylvania and to the decisions of the Supreme Court of Pennsylvania, which law is controlling in this action, to wit, the panel's decision is contrary to the decision of *Heinl v. Pecher*, 330 Pa. 232, 198A. 797 (1938) and Article I, §27 of the Pennsylvania Constitution, and 35 Pa. C.S.A. §691.1 et seq. And, that this appeal involves a question of exceptional importance, to wit, whether the panel decision establishes a precedent which encourages a party who contaminates land to escape liability by divesting itself of that land, while shifting the sole responsibility for abating the public nuisance to an innocent property owner who's land and groundwater is contaminated by the nuiusance, which is a case of first impression that

presents critical issues of economic, environmental and social circumstances.

Respectfully submitted,

KITTREDGE, KAUFMAN
& DONLEY

Joseph M. Donley
121 South Broad Street
8th Floor
Philadelphia, PA 19107
(215) 732-2700

Attorneys for Petitioner
Philadelphia Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served on this 11th day of June, 1985, by hand, two copies of the Petition of Appellee Philadelphia Electric Company for Rehearing Before the Court In Banc on the below-listed counsel:

John C. Sullivan, Esq.
FRUMKIN & MANTA
1818 Three Penn Center Plaza
Philadelphia, PA 19102

Attorney for Appellant
Hercules Incorporated

Kean K. McDonald, Esq.
LABRUM AND DOAK
700 IVB Building
1700 Market Street
Philadelphia, PA 19103

Attorney for Appellee
Gould, Inc.

A copy of same was mailed, first class, this 11th day of June, 1985, to:

John G. Gleeson, Esq.
HERCULES INCORPORATED
Hercules Plaza
Wilmington, DE 19899

JOSEPH M. DONELY

CERTIFICATE OF SERVICE

I certify that three copies of this Brief of Hercules Incorporated in Opposition to Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class postage, prepaid this 18th day of October, 1985, to:

Joseph M. Donley, Esquire
KITTREDGE, KAUFMAN
& DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107

Kean K. McDonald, Esquire
700 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103

JOHN C. SULLIVAN

Attorney for Respondent
Hercules Incorporated